





LIBRARY  
OF THE  
UNIVERSITY OF CALIFORNIA.  
GIFT OF

*the author.*

Received *Mar.*, 1895.

Accessions No. *59493.*

Class No.

*308x*

*F456*

*v. 5*

*The Bancroft Library*

University Library

University of California • Berkeley























---

---

SOME  
OPINIONS AND PAPERS  
OF  
STEPHEN J. FIELD,

ASSOCIATE JUSTICE AND CHIEF JUSTICE OF THE SUPREME  
COURT OF CALIFORNIA,

UNITED STATES CIRCUIT JUSTICE FOR THE NINTH AND  
TENTH CIRCUITS,

AND

ASSOCIATE JUSTICE OF THE SUPREME COURT OF THE  
UNITED STATES.

---

Vol. V.

---

---





59493.

## NOTE.

---

Preceding each volume of these bound pamphlets is an Index of the Opinions in that volume. At the end of the Sixth Volume will be found a full Index of the subjects considered in the six volumes.







# INDEX.

VOL. V.

---

No. of  
Pamphlet. •

## CHICAGO LAKE FRONT CASE—ILLINOIS CENTRAL RAILROAD Co. *v.* ILLINOIS, (146 U. S. 387.)

The trust nature of the title by which the State holds lands covered by navigable waters in the streams, lakes, and harbors within their limits; and their inalienability, except in execution of such trust. Also comment, in the May number of *The Harvard Law Review*, by Merritt Starr, Esq., of the Chicago bar, upon a note relating to this case in the March number of that journal..... 2

## IN RE ROSS, (140 U. S. 453.)

Power of an American consular court to try and sentence an American citizen charged with murder committed on board of an American ship in a foreign port where the consular court is held..... 1

## IOWA *v.* ILLINOIS, (147 U. S. 1.)

The line in a navigable river between States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river..... 4

## SHARON, EXECUTOR, *v.* TERRY AND WIFE, AND NEWLANDS, TRUSTEE, *v.* TERRY AND WIFE, (13 Sawyer's Cir. Ct. Rep. 387.)

When a Federal court and a State court may each take jurisdiction of the same subject-matter and parties, the tribunal whose jurisdiction first attaches will retain it... 6



THE TERRY CONTEMPT, (13 Sawyer's Cir. Ct. Rep.  
440.)

Orders adjudging Mr. and Mrs. Terry guilty of contempt,  
and awarding punishment therefor, and petition of Terry  
for revocation of the orders. Opinion of Justice Field,  
denying the petition, and affidavits of the officers of the  
court and other eye-witnesses, detailing the facts of the  
occurrence .....

7

UNITED STATES *v.* RODGERS, (150 U. S. 249.)

The open, unenclosed waters of the Great Lakes within  
the meaning of the term "high seas" in section 5346 of  
the Revised Statutes .....

3

VIRGINIA *v.* TENNESSEE, (148 U. S. 503.)

The boundary line between the States of Virginia and Ten-  
nessee stated; the history of the royal grants and of  
the colonial and State legislation upon the subject re-  
viewed; and what constitutes an agreement or compact  
between two States of the Union, and what the consent  
of Congress to such an agreement or compact within  
the meaning of Article I of the Constitution, considered  
and explained .....

5

APPENDIX CONTAINING:

1. Decision of U. S. Supreme Court in the matter of David  
S. Terry, delivered by Justice Harlan, on the authority  
of the courts of the United States to punish for con-  
tempts committed in their presence, (128 U. S. 289).....
2. Opinion of Circuit Court of the United States for the  
Northern District of California in the matter of David  
Neagle, on *habeas corpus*, delivered at San Francisco,  
September 16, 1889, by Circuit Judge Sawyer, (14 Saw-  
yer's Cir. Ct. Rep. 232).....

8

9

3. Opinion of U. S. Supreme Court, *In re Neagle*, on the constitutional power of the Federal Government, through the executive department, to protect the judges of the United States courts against revengeful and murderous assaults of defeated litigants without subjecting its appointed agents to malicious prosecution for their fidelity to duty by State officials; delivered by Justice Miller at October Term, 1889, (135 U. S. 1) ..... 10
4. The story of the attempted assassination of Justice Field by a former associate on the Supreme Bench of California, by Hon. George C. Gorham..... 11





















Power of American Consular Courts to try and sentence American citizens charged with murder committed on board of an American ship in a foreign port where such consular tribunal is held.

---

OPINION  
OF  
UNITED STATES SUPREME COURT  
IN RE ROSS,  
Delivered at October Term, 1890,\*  
BY  
MR. JUSTICE FIELD.

---

By the Constitution of the United States a government is ordained and established "for the United States of America," and not for countries outside of their limits; and that Constitution can have no operation in another country.

The laws passed by Congress to carry into effect the provisions of the treaties granting extritorial rights in Japan, China, etc. (Rev. Stat. §§ 4083-4096), do no violation to the provisions of the Constitution of the United States, although they do not require an indictment by a grand jury to be found before the accused can be called upon to answer for the crime of murder committed in those countries, or secure to him a jury on his trial.

The provision in Rev. Stat. § 4086, that the jurisdiction conferred upon ministers and consuls of the United States in Japan, China, etc., by §§ 4083, 4084 and 4085, shall "be exercised and enforced in conformity with the laws of the United States," gives to the accused an opportunity of examining the complaint against him, or of having a copy of it, the right to be confronted with the witnesses against him, and to cross-examine them, and to have the benefit of counsel, and secures regular and fair trials to Americans committing offences there, but it does not require a previous presentment or indictment by a grand jury, and does not give the right to a petit jury.

The jurisdiction given to domestic tribunals of the United States over offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of a consular tribunal in Japan, China,

---

\* Reported in 140 U. S., 453.

etc., to try for a similar offence, committed in a port of the country in which the tribunal is established, when the offender is not taken to the United States.

Article IV of the treaty of June 17, 1857, with Japan is still in force notwithstanding the provisions in Article XII of the treaty of July, 29, 1858.

When a foreigner enters the mercantile marine of a nation, and becomes one of the crew of a merchant vessel bearing its flag, he assumes a temporary allegiance to the flag, and, in return for the protection afforded him, becomes subject to the laws by which that nation governs its vessels and seamen.

A law or treaty should be construed so as to give effect to the object designed, and to that end all its provisions must be examined in the light of surrounding circumstances.

The fact that a vessel is American is evidence that seamen on board are Americans also.

When a person convicted of murder accepts a "commutation of sentence or pardon" upon condition that he be imprisoned at hard labor for the term of his natural life, there can be no question as to the binding force of the acceptance.

THE petitioner below, the appellant here, is imprisoned in the penitentiary at Albany in the State of New York. He was convicted on the 20th of May, 1880, in the American consular tribunal in Japan, of the crime of murder, committed on board of an American ship in the harbor of Yokohama in that empire, and sentenced to death.

On the 6th of August following, his sentence was commuted by the President to imprisonment for life in the penitentiary at Albany, and to that place he was taken and there he has ever since been confined. Nearly ten years afterwards, on the 19th of March, 1890, he applied to the Circuit Court of the United States for the Northern District of New York for a writ of *habeas corpus* for his discharge, alleging that his conviction, sentence and imprisonment were unlawful, and stating the causes thereof and the attendant circumstances. The writ was issued, directed to the superintendent of the penitentiary, who made return that he held the petitioner under the warrant of the President, of which a copy was annexed, and was as follows:

“ Rutherford B. Hayes, President of the United States of America, to all to whom these presents shall come, Greeting :

“ Whereas John M. Ross, an American seaman on board of the American ship ‘ Bullion,’ was, on the 20th day of May, 1880, convicted of the crime of murder, committed on board the said ship ‘ Bullion,’ then in the harbor of Yokohama, Japan, before Thomas B. Van Buren, Esquire, consul general of the United States at Kanagawa, Japan, holding court at that place, and was by said consul general on such conviction aforesaid, in pursuance and by authority of the statutes of the United States to that end made and provided, sentenced to be hanged, ‘ at such time and place as the United States minister in Japan may direct, according to law ;’

“ And whereas Mr. Bingham, the United States minister aforesaid, on the 22d of May following, approved the proceedings, verdict and sentence ;

“ And whereas the said minister has postponed the execution of sentence, believing the ends of justice demand it, and has submitted the record of the case to the Department of State for the President’s consideration and for commutation of sentence or pardon, if deemed advisable ;

“ And whereas the President, upon a careful consideration of the facts and circumstances of the case as they were presented in the record of the proceedings and by a report from the Secretary of State, has arrived at the conclusion that the ends of justice will be fulfilled by the infliction of a less severe punishment than that of death :

“ Now, therefore, be it known that I, Rutherford B. Hayes, President of the United States of America, in consideration of the premises, divers other good and sufficient reasons also me thereunto moving, do hereby pardon the said John M. Ross on condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York.

"This order will be carried into effect under the direction of the Secretary of State.

"In testimony whereof I have hereunto signed my name and caused the seal of the United States to be affixed.

"Done at the city of Washington this sixth day of August, A.D. 1880, and of the Independence of the United States the one hundred and fifth.

"[SEAL.]

R. B. HAYES.

"By the President :

"W. M. EVARTS, *Secretary of State.*"

To this warrant was annexed a copy of the petitioner's acceptance of the conditional pardon of the President, certified to be correct by the United States consul general at Japan. It was as follows :

"I, John M. Ross, the person named in the warrant of conditional pardon granted to me by the President of the United States of America, dated the sixth day of August, 1880, and of which the foregoing is a correct copy, do hereby acknowledge the delivery of said original warrant of conditional pardon to me, and do hereby voluntarily and without qualification accept said conditional pardon with the condition thereof as therein stated, to wit, that 'I, Rutherford B. Hayes, President of the United States of America, etc., etc., do hereby pardon the said John M. Ross on the condition that the said John M. Ross be imprisoned at hard labor for the term of his natural life in the Albany penitentiary, in the State of New York.'

"JOHN M. ROSS.

"Kanagawa, Yokohama, Japan, February 28th, 1881.

"Witness : THOS. B. VAN BUREN,

*U. S. Consul General.*"

The case was then heard by the Circuit Court, counsel appearing for the petitioner and the assistant United States



attorney for the government. On the hearing, a copy of the record of the proceedings before the consular tribunal, and of the communications by the consular general to the state department respecting them, on file in that department, was given in evidence. No objection was made to its admissibility.

The facts of the case as thus disclosed, so far as they were deemed material to the decision of the questions presented, were substantially as follows :

On the 9th of May, 1880, the appellant, John M. Ross, was one of the crew of the American ship *Bullion*, then in the waters of Japan, and lying at anchor in the harbor of Yokohama. On that day, on board of the ship, he assaulted Robert Kelly, its second mate, with a knife, inflicting in his neck a mortal wound, of which in a few minutes afterwards he died on the deck of the ship. Ross was at once arrested by direction of the master of the vessel and placed in irons, and on the same day he was taken ashore and confined in jail at Yokohama. On the following day, May 10th, the master filed with the American consul general at that place, Thomas B. Van Buren, a complaint against Ross, charging him with the murder of the mate. It contained sufficient averments of the offence, was verified by the oath of the master, and to it the consul general appended his certificate that he had reasonable grounds for believing its contents were true. The complaint described the accused as one "supposed to be a citizen of the United States."

On the 18th of that month an amended complaint was filed by the master of the ship with the consul general, in which the accused was described as "an American seaman, duly and lawfully enrolled and shipped and doing service as such seaman on board the American ship *Bullion*." The complaint was also amended in some other particulars. It was as follows :

“U. S. Consular General Court, Kanagawa, Japan.

“*Amended Complaint.*

“John P. Reed, master of the American ship ‘Bullion,’ on oath complains that John Martin Ross, an American seaman, duly and lawfully enrolled and shipped and doing service as such seaman on board the American ship ‘Bullion,’ did on the early morning of the 9th day of May, 1880, on board of said ship, while lying in the harbor of Yokohama, Japan, and within the jurisdiction of this court, with force and arms, maliciously, feloniously, deliberately, wilfully and of his malice aforethought, make an assault upon one Robert Kelly, the mate of said ship, and did then and there feloniously, maliciously, deliberately and of malice aforethought, strike and cut the said Robert Kelly with a knife, from which said Robert Kelly died on board said ship a short time thereafter. Wherefore affiant charges that said John Martin Ross wilfully and maliciously killed and murdered the said Robert Kelly, and affiant further says that said John Martin Ross is still a seaman on said ship.

“J. P. REED.

“Sworn and subscribed before me this 18th day of May, 1880.

“THOS. B. VAN BUREN,

“*U. S. Consul General.*”

To this amended complaint was annexed a certificate of the consul general that he had reasonable grounds for believing its contents to be true, similar to the one to the original complaint.

Previously to its being filed the accused appeared with counsel before the consul general, and the complaint being read to him, he presented an affidavit stating that he was a subject of Great Britain, a native of Prince Edward’s Island, a dependency of the British Empire, and had never

renounced the rights or liabilities of a British subject or been expatriated from his native allegiance or been naturalized in any other country. Upon this affidavit he contended that the court was without jurisdiction over him, by reason of his being a subject of Great Britain, and he prayed that he be discharged. His contention was termed in the record a demurrer to the complaint.

The court held that as the accused was a seaman on an American vessel, he was subject to its jurisdiction, and overruled the objection. The counsel of the accused then moved that the charge against him be dismissed, on the ground that he could not be held for the offence except upon the presentment or indictment of a grand jury, but this motion was also overruled.

Four associates were drawn, as required by statute and the consular regulations, to sit with the consul general on the trial of the accused, and; being sworn to answer questions as to their eligibility, the accused stated that he had no questions to ask them on that subject. They were then sworn in to try the cause "in accordance with court regulations." A motion for a jury on the trial was also made and denied. The amended complaint was then substituted in place of the original, to which no objection was interposed, and to it the accused pleaded "not guilty," and asked for the names of the witnesses for the prosecution, which were furnished to him. The witnesses were then sworn and examined, and they established beyond all possible doubt the offence of murder charged against the accused, which was committed under circumstances of great atrocity. The court found him guilty of murder, and he was sentenced to suffer death in such manner and at such time and place as the United States minister should direct. The conviction and sentence were concurred in by the four associates, and were approved by Mr. Bingham, the minister of the United States in Japan. The minister transmitted the record of the case to the Department of State for

the consideration of the President, and for commutation of the sentence or pardon of the prisoner, if deemed advisable. The President subsequently directed the issue to the prisoner of a pardon on condition that he be imprisoned at hard labor for the term of his natural life in the penitentiary at Albany, and it was accepted by him on that condition. His sentence was accordingly commuted, and he was removed to the Albany penitentiary.

The Circuit Court, after hearing argument of counsel and full consideration of the subject, made an order on January 21, 1891, denying the motion of the prisoner for his discharge, and remanding him to the penitentiary and the custody of its superintendent. (44 Fed. Rep. 185.) From that order the case was brought here on appeal.

*Mr. George W. Kirchwey*, for appellant, made the following points:

I. The crime having been committed on board an American vessel, although such vessel was lying in the harbor of Kanagawa, Japan, was not committed within the territorial jurisdiction of the Consular General Court of Kanagawa, but within that of the United States. It was cognizable only by the domestic tribunals of the United States.

*First.* The Consular General Court, being a court of special and limited jurisdiction, has no powers save such as are expressly conferred by the treaty and statutes to which it owes its origin. These expressly confine its jurisdiction to the territorial limits of Japan.

*Second.* The domestic jurisdiction of the modern State extends to crimes committed upon private as well as public vessels of the State upon the high seas. For the purposes of this jurisdiction, a foreign port is regarded as being within the high seas, and the ship as a part of the territory of the State to which she belongs.

*Third.* The original and domestic jurisdiction of the Federal courts being adequate to deal with cases of this

kind, it will not be presumed that the Congress intended to set up a novel jurisdiction of limited and inferior character, to supersede or compete with the former.

*Fourth.* The mode in which the jurisdiction of the United States in such cases must be exercised is prescribed by statute. It is expressly provided that all crimes committed on American vessels on the high seas shall be tried within the United States.

II. If it be claimed that the offence in question was committed in Japan, and not upon the high seas, the consular jurisdiction of the United States is wholly excluded by the fact that the record does not disclose facts conferring jurisdiction under the treaties and laws.

*First.* The treaties of the United States with Japan, and the laws passed by Congress in pursuance thereof, expressly restrict the jurisdiction of the consular courts to citizens of the United States. It does not appear that Ross was a citizen of the United States.

*Second.* The statutes creating the consular courts, as well as the treaties under which they are instituted, and from which they derive such authority and jurisdiction as they possess, expressly subject that jurisdiction to the laws of the United States.

*Third.* The claim that the Constitution has no extraterritorial force is disproved by the existence and operation of the consular court itself.

III. The refusal to allow the accused a trial by jury was a fatal defect in the jurisdiction exercised by the court, and renders its judgment absolutely void.

*First.* The jury contemplated by the Constitution (Art. III, § 2, subd. 3; amendments, Art. VI), and demanded by the appellant, is a common law jury of twelve men.

*Second.* There appears to be nothing in the legislation of Congress relating to the exercise of this consular jurisdiction to preclude compliance with the constitutional requirement.



*Mr. Assistant Attorney General Parker* for appellee.

MR. JUSTICE FIELD, after stating the case, delivered the opinion of the court.

The Circuit Court did not refuse to discharge the petitioner upon any independent conclusion as to the validity of the legislation of Congress establishing the consular tribunal in Japan, and the trial of Americans for offences committed within the territory of that country, without the indictment of a grand jury, and without a trial by a petit jury, but placed its decision upon the long and uniform acquiescence by the executive, administrative and legislative departments of the government in the validity of the legislation. Nor did the Circuit Court consider whether the status of the petitioner as a citizen of the United States, or as an American within the meaning of the treaty with Japan, could be questioned, while he was a seaman of an American ship, under the protection of the American flag, but simply stated the view taken on that subject by the Minister to Japan, the State Department, and the President. Said the court: "During the thirty years since the statutes conferring the judicial powers on ministers and consuls, which have been referred to, were enacted, that jurisdiction has been freely exercised. Citizens of the United States have been tried for serious offences before these officers, without preliminary indictment or a common law jury, and convicted and punished. These trials have been authorized by the regulations, orders and decrees of ministers, and it must be presumed that the regulations, orders and decrees of ministers prescribing the mode of trial have been transmitted to the Secretary of the State, and by him been laid before Congress for revision, as required by law. Unless the petitioner was not properly subject to this jurisdiction because he was not a citizen of the United States, his trial and sentence were in all respects

modal, as well as substantial, regular and valid under the laws of Congress, according to the construction placed upon these statutes by the acquiescence of the executive, administrative and legislative departments of the government for this long period of time."

Under these circumstances the Circuit Court was of opinion that it ought not to adjudge that the sentence imposed upon the petitioner was utterly unwarranted and void, when the case was one in which his rights could be adequately protected by this court, and when a decision by the Circuit Court setting him at liberty, although it might be reversed, would be practically irrevocable.

The Circuit Court might have found an additional ground for not calling in question the legislation of Congress, in the uniform practice of civilized governments for centuries to provide consular tribunals in other than Christian countries, or to invest their consuls with judicial authority, which is the same thing, for the trial of their own subjects or citizens for offences committed in those countries, as well as for the settlement of civil disputes between them; and in the uniform recognition, down to the time of the formation of our government, of the fact that the establishment of such tribunals was among the most important subjects for treaty stipulations. This recognition of their importance has continued ever since, though the powers of those tribunals are now more carefully defined than formerly. *Dainese v. Hale*, 91 U. S. 13.

The practice of European governments to send officers to reside in foreign countries, authorized to exercise a limited jurisdiction over vessels and seamen of their country, to watch the interests of their countrymen and to assist in adjusting their disputes and protecting their commerce, goes back to a very early period, even preceding what are termed the Middle Ages. During those ages these commercial magistrates, generally designated as consuls, possessed to some extent a representative character, sometimes

discharging judicial and diplomatic functions. In other than Christian countries they were, by treaty stipulations, usually clothed with authority to hear complaints against their countrymen and to sit in judgment upon them when charged with public offences. After the rise of Islamism, and the spread of its followers over eastern Asia and other countries bordering on the Mediterranean, the exercise of this judicial authority became a matter of great concern. The intense hostility of the people of Moslem faith to all other sects, and particularly to Christians, affected all their intercourse, and all proceedings had in their tribunals. Even the rules of evidence adopted by them placed those of different faith on unequal grounds in any controversy with them. For this cause and by reason of the barbarous and cruel punishments inflicted in those countries, and the frequent use of torture to enforce confession from parties accused, it was a matter of deep interest to Christian governments to withdraw the trial of their subjects, when charged with the commission of a public offence, from the arbitrary and despotic action of the local officials. Treaties conferring such jurisdiction upon these consuls were essential to the peaceful residence of Christians within those countries and the successful prosecution of commerce with their people.

The treaty-making power vested in our government extends to all proper subjects of negotiation with foreign governments. It can, equally with any of the former or present governments of Europe, make treaties providing for the exercise of judicial authority in other countries by its officers appointed to reside therein.

We do not understand that any question is made by counsel as to its power in this respect. His objection is to the legislation by which such treaties are carried out, contending that, so far as crimes of a felonious character are concerned, the same protection and guarantee against an undue accusation or an unfair trial, secured by the Consti-

tution to citizens of the United States at home, should be enjoyed by them abroad. In none of the laws which have been passed by Congress to give effect to treaties of the kind has there been any attempt to require indictment by a grand jury before one can be called upon to answer for a public offence of that grade committed in those countries, or to secure a jury on the trial of the offence. Yet the laws on that subject have been passed without objection to their constitutionality. Indeed, objection on that ground was never raised in any quarter, so far as we are informed, until a recent period.

It is now, however, earnestly pressed by counsel for the petitioner, but we do not think it tenable. By the Constitution a government is ordained and established "for the United States of America," and not for countries outside of their limits. The guarantees it affords against accusation of capital or infamous crimes, except by indictment or presentment by a grand jury, and for an impartial trial by a jury when thus accused, apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad. (*Cook v. United States*, 138 U. S. 157, 181.) The Constitution can have no operation in another country. When, therefore, the representatives or officers of our government are permitted to exercise authority of any kind in another country, it must be on such conditions as the two countries may agree, the laws of neither one being obligatory upon the other. The deck of a private American vessel, it is true, is considered for many purposes constructively as territory of the United States, yet persons on board of such vessels, whether officers, sailors, or passengers, cannot invoke the protection of the provisions referred to until brought within the actual territorial boundaries of the United States. And, besides, their enforcement abroad in numerous places, where it would be highly important to have consuls invested with

judicial authority, would be impracticable from the impossibility of obtaining a competent grand or petit jury. The requirement of such a body to accuse and to try an offender would, in a majority of cases, cause an abandonment of all prosecution. The framers of the Constitution, who were fully aware of the necessity of having judicial authority exercised by our consuls in non-Christian countries, if commercial intercourse was to be had with their people, never could have supposed that all the guarantees in the administration of the law upon criminals at home were to be transferred to such consular establishments, and applied before an American who had committed a felony there could be accused and tried. They must have known that such a requirement would defeat the main purpose of investing the consul with judicial authority. While, therefore, in one aspect the American accused of crime committed in those countries is deprived of the guarantees of the Constitution against unjust accusation and a partial trial, yet in another aspect he is the gainer, in being withdrawn from the procedure of their tribunals, often arbitrary and oppressive, and sometimes accompanied with extreme cruelty and torture. Letter of Mr. Cushing to Mr. Calhoun of September 29, 1844, accompanying President's message communicating abstract of treaty with China, Senate Doc. 58, 28th Cong. 2d Sess.; Letter on Judicial Extraterritorial Rights by Secretary Frelinghuysen to Chairman of Senate Committee on Foreign Relations of April 29, 1882, Senate Doc. 89, 47th Cong. 1st Sess.; Phillimore on Int. Law, vol. 2, part 7; Halleck on Int. Law, c. 41.

We turn now to the treaties between Japan and the United States.

The treaty of June 17, 1857, executed by the consul general of the United States and the governors of Simoda, is the one which first conceded to the American consul in Japan authority to try Americans committing offences in that country. Article IV of that treaty is as follows :



“ART. IV. Americans committing offences in Japan shall be tried by the American consul general or consul, and shall be punished according to American laws. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese laws.” 11 Stat. 723.

The treaty with Japan of July 29, 1858, in some particulars changes the phraseology of the concession of judicial authority to the American consul in Japan, but, as we shall see subsequently, without revocation of the concession itself. Its sixth article is as follows:

“ART. VI. Americans committing offences against Japanese shall be tried in American consular courts and when guilty shall be punished according to American law. Japanese committing offences against Americans shall be tried by the Japanese authorities and punished according to Japanese law. The consular courts shall be open to Japanese creditors, to enable them to recover their just claims against American citizens, and the Japanese courts shall in like manner be open to American citizens for the recovery of their just claims against Japanese.” 12 Stat. 1056.

As will be seen, the language of the fourth article of the treaty of 1857 is that “Americans committing offences in Japan shall be tried,” etc.; while the language of the sixth article of the treaty of 1858 is that “Americans committing offences against Japanese shall be tried,” etc. Offences committed in Japan and offences committed against Japanese are not necessarily identical in meaning. The latter standing by itself would require a more restricted construction. But the twelfth article of that treaty obviates that. It is as follows:

“ART. XII. Such of the provisions of the treaty made by Commodore Perry and signed at Kanagawa on the 31st of March, 1854, as conflict with the provisions of this treaty are hereby revoked; and as all the provisions of a convention executed by the consul general of the United States

and the governors of Simoda, on the 17th of June, 1857, are incorporated in this treaty, that convention is also revoked."

It will thus be perceived that the revocation of the treaty of 1857 was made upon the assumption and declaration that all its provisions were incorporated into the treaty of 1858. The revocation must, therefore, be held to be limited to those provisions and those only which are thus incorporated, that treaty still remaining in force as to the unincorporated provisions. This has been the practical construction given to the alleged revocation by the authorities of both countries—a construction which, in view of the erroneous statement as to the incorporation into the new treaty of all the provisions of the former one, is reasonable and just.

Our government has always treated Article IV of the treaty of 1857 as continuing in force, and it is published as such in the United States Consular Regulations, issued in 1888. Appendix No. 1, p. 313. Its official interpretation is found in Article 71 of those regulations, which declares that "consuls have exclusive jurisdiction over crimes and offences committed by citizens of the United States in Japan." Mr. Bingham, our minister to that country for several years after the treaty of 1858, always assumed the incorporation into that treaty of all the provisions of the treaty of 1857, or that they were saved by it. When the prisoner reached San Francisco, on his way from Japan to Albany, he applied to the Circuit Court of the United States for a writ of *habeas corpus*, and cited the sixth article of the treaty of 1858, insisting that it only provided for the trial of Americans by American consular courts in Japan for offences committed against Japanese, and therefore he could not be held to answer for the murder of the second officer of the American ship Bullion, when in Japanese waters, because he was not a Japanese subject. In a communication made under date of June 8, 1881, by

the minister to the Secretary of State, reference is made to this position, and the following language is used: "Nothing, in my opinion, could more strongly testify to the utter weakness of the claim made for Ross against the government than this attempt to limit the jurisdiction of our consuls in Japan over Americans, guilty of crimes by them committed within this empire, to such crimes only as they should commit upon the persons of Japanese subjects. According to this logic, Americans may in Japan murder each other and the citizens or subjects of all lands save the subjects of Japan with impunity—as it is admitted by this government that it cannot try an American for any offence whatever—and it must also be conceded that the tribunals of no other government than our own can try Americans for crimes by them committed within this empire. In giving my reasons to the department for sustaining the jurisdiction of the United States in this case, and for approving as I did the conviction of Ross, in which the consul general and the four associates who sat with him had concurred, I cited Article IV of our convention of 1857 with Japan, to wit: 'That Americans committing offences in Japan shall be tried by the American consul general or consul, and shall be punished according to American law.' This provision of the convention of 1857 and all other provisions thereof were saved and incorporated in our treaty of 1858 with Japan, Article XII, [quoted above.] You will observe that Mr. Townsend Harris was the consul general of the United States who negotiated both of these treaties with Japan, and that the treaty of 1858 was ratified April 12, 1860, and that thereafter, to wit, June 22, 1860, Congress passed the act to carry into effect this treaty with Japan, and provided that the minister and consuls of the United States in Japan be 'fully empowered to arraign and try in the manner (in said statute provided) all citizens of the United States charged with offences against law committed' (by them in Japan;) [sec. 4084, Rev. Stat.];



and also by section 4086 provided that the jurisdiction in both civil and criminal matters in Japan shall '*in all cases* be exercised and enforced in conformity with the laws of the United States, which so far as necessary to execute such treaty are extended over all citizens of the United States therein, and over *all others* to the extent the terms of the treaty justify or require.' Here was the construction above stated by me asserted by the same Senate which ratified the treaty, and by the same President who approved both the treaty and the act of Congress. The President and the department have always construed the treaty of 1858 as carrying with it and incorporating therein the fourth article and all other provisions of the convention of 1857."

The legislation of Congress to carry into effect the treaty with Japan is found in the Revised Statutes, in sections most of which apply equally to treaties with China, Siam, Egypt and Madagascar (secs. 4083-4091). Confining ourselves to the treaty with Japan only, we find that the legislation secures a regular and fair trial to Americans committing offences within that empire.

It enacts that the minister and consuls of the United States, appointed to reside there, shall, in addition to other powers and duties imposed upon them respectively, be invested with the judicial authority therein described, which shall appertain to their respective offices and be a part of the duties belonging thereto, so far as the same is allowed by treaty; and empowers them to arraign and try, in the manner therein provided, all citizens of the United States charged with offences against law committed in that country, and to sentence such offenders as therein provided, and to issue all suitable and necessary process to carry their authority into execution. It declares that their jurisdiction in both criminal and civil matters shall in all cases be exercised and enforced in conformity with the laws of the United States, which, so far as necessary to execute the



treaty and suitable to carry it into effect, are extended over all citizens of the United States in Japan, and over all others there to the extent that the terms of the treaty justify or require. It also provides that where such laws are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies, the common law and the law of equity and admiralty shall be extended in like manner over such citizens and others; and that if neither the common law, nor the law of equity, or admiralty, nor the statutes of the United States, furnish appropriate and sufficient remedies, the minister shall, by decrees and regulations, which shall have the force of law, supply such defects and deficiencies. Each of the consuls is authorized, upon facts within his own knowledge, or which he has good reason to believe true, or upon complaint made or information filed in writing and authenticated in such way as shall be prescribed by the minister, to issue his warrant for the arrest of any citizen of the United States charged with committing in the country an offence against law; and to arraign and try any such offender; and to sentence him to punishment in the manner therein prescribed.

The legislation also declares that insurrection or rebellion against the government, with intent to subvert the same, and murder, shall be punishable with death, but that no person shall be convicted thereof unless the consul and his associates in the trial all concur in the opinion, and the minister approves of the conviction. It also provides that whenever in any case the consul is of opinion that, by reason of the legal questions which may arise therein, assistance will be useful to him, or that a severer punishment than previously specified in certain cases will be required, he shall summon to sit with him on the trial one or more citizens of the United States, not exceeding four, and in capital cases not less than four, who shall be taken by lot from a list which has been previously submitted to and approved by the minister, and shall be persons of good repute and competent for the duty.



The jurisdiction of the consular tribunal, as is thus seen, is to be exercised and enforced in accordance with the laws of the United States; and of course in pursuance of them the accused will have an opportunity of examining the complaint against him, or will be presented with a copy stating the offence he has committed, will be entitled to be confronted with the witnesses against him and to cross-examine them, and to have the benefit of counsel; and, indeed, will have the benefit of all the provisions necessary to secure a fair trial before the consul and his associates. The only complaint of this legislation made by counsel is that, in directing the trial to be had before the consul and associates summoned to sit with him, it does not require a previous presentment or indictment by a grand jury, and does not give to the accused a petit jury. The want of such clauses, as affecting the validity of the legislation, we have already considered. It is not pretended that the prisoner did not have, in other respects, a fair trial in the consular court.

It is further objected to the proceedings in the consular court that the offence with which the petitioner was charged, having been committed on board of a vessel of the United States in Japanese waters, was not triable before the consular court; and that the petitioner, being a subject of Great Britain, was not within the jurisdiction of that court. These objections we will now proceed to consider.

The argument presented in support of the first of these positions is briefly this. Congress has provided for the punishment of murder committed upon the high seas, or any arm or bay of the sea within the admiralty and maritime jurisdiction of the United States, and out of the jurisdiction of any particular State; and has provided that the trial of all offences committed upon the high seas, out of the jurisdiction of any particular State, shall be in the district where the offender is found or into which he is first brought. The term "high seas" includes waters on the sea-coast without the boundaries of low-water mark; and the

waters of the port of Yokohama constitute, within the meaning of the statute, high seas. Therefore it is contended that, although the ship Bullion was at the time lying in those waters, the offence for which the appellant was tried and convicted was committed on the high seas and within the jurisdiction of the domestic tribunals of the United States, and is not punishable elsewhere. In support of this position it is assumed that the jurisdiction of the consular court is limited to offences committed on land, within the territory of Japan, to the exclusion of offences committed on waters within that territory.

There is, as it seems to us, an obvious answer to this argument. The jurisdiction to try offences committed on the high seas in the district where the offender may be found, or into which he may be first brought, is not exclusive of the jurisdiction of the consular tribunal to try a similar offence when committed in a port of a foreign country in which that tribunal is established, and the offender is not taken to the United States. There is no law of Congress compelling the master of a vessel to carry or transport him to any home port when he can be turned over to a consular court having jurisdiction of similar offences committed in the foreign country. 7 Opinions Attys. Gen. 722. The provisions conferring jurisdiction in capital cases upon the consuls in Japan, when the offence is committed in that country, are embodied in the Revised Statutes, with the provisions as to the jurisdiction of domestic tribunals over such offences committed on the high seas; and those statutes were reënacted together, and, as reënacted, went into operation at the same time. To both effect must be given in proper cases, where they are applicable. We do not adopt the limitation stated by counsel to the jurisdiction of the consular tribunal, that it extends only to offences committed on land. Neither the treaty nor the Revised Statutes to carry them into effect contain any such limitation. The latter speak of offences committed in the country of

Japan—meaning within the territorial jurisdiction of that country—which includes its ports and navigable waters as well as its lands.

The position that the petitioner, being a subject of Great Britain, was not within the jurisdiction of the consular court, is more plausible, but admits, we think, of a sufficient answer. The national character of the petitioner, for all the purposes of the consular jurisdiction, was determinable by his enlistment as one of the crew of the American ship *Bullion*. By such enlistment he becomes an American seaman—one of an American crew on board of an American vessel—and as such entitled to the protection and benefits of all the laws passed by Congress on behalf of American seamen, and subject to all their obligations and liabilities. Although his relations to the British government are not so changed that, after the expiration of his enlistment on board of the American ship, that government may not enforce his obligation of allegiance, and he on the other hand may not be entitled to invoke its protection as a British subject, that relation was changed during his service of seaman on board of the American ship under his enlistment. He could then insist upon treatment as an American seaman, and invoke for his protection all the power of the United States which could be called into exercise for the protection of seamen who were native born. He owes for that time to the country to which the ship on which he is serving belongs, a temporary allegiance, and must be held to all its responsibilities. The question has been treated more as a political one for diplomatic adjustment, than as a legal one to be determined by the judicial tribunals, and has been the subject of correspondence between our government and that of Great Britain.

The position taken by our government is expressed in a communication from the Secretary of State, to the British government, under date of June 16, 1881. It was the assertion of a principle which the Secretary insisted “is in

entire conformity with the principles of English law as applied to a mercantile service almost identical with our own in its organization and regulation. That principle is that, when a foreigner enters the mercantile marine of any nation and becomes one of the crew of a vessel having undoubtedly a national character, he assumes a temporary allegiance to the flag under which he serves, and in return for the protection afforded him becomes subject to the laws by which that nation in the exercise of an unquestioned authority governs its vessels and seamen. If, therefore," he continued, "the government of the United States has by treaty stipulation with Japan acquired the privilege of administering its own laws upon its own vessels and in relation to its own seamen in Japanese territory, then every American vessel and every seaman of its crew are subject to the jurisdiction which by such treaty has been transferred to the government of the United States."

"If Ross had been a passenger on board of the *Bullion*, or if, residing in Yokohama, he had come on board temporarily and had then committed the murder, the question of jurisdiction would have been very different. But, as it was, he was part of the crew, a duly enrolled seaman under American laws, enjoying the protection of this government to such an extent that he could have been protected from arrest by the British authorities; and his subjection to the laws of the United States cannot be avoided just at the moment that it suits his convenience to allege foreign citizenship. The law which he violated was the law made by the United States for the government of United States vessels; the person murdered was one of his own superior officers whom he had bound himself to respect and obey, and it is difficult to see by what authority the British government can assume the duty or claim the right to vindicate that law or protect that officer."

"The mercantile service is certainly a national service, although not quite in the sense in which that term would be



applied to the national navy. It is an organized service, governed by a special and complex system of law, administered by national officers, such as collectors, harbor masters, shipping masters and consuls, appointed by national authority. This system of law attaches to the vessel and crew when they leave a national port and accompanies them round the globe, regulating their lives, protecting their persons and punishing their offences. The sailor, like the soldier during his enlistment, knows no other allegiance than to the country under whose flag he serves. This law may be suspended while he is in the ports of a foreign nation, but where such foreign nation grants to the country which he serves the power to administer its own laws in such foreign territory, then the law under which he enlisted again becomes supreme."

The Secretary concluded his communication with the following expression of the determination of our government:

"So impressed is this government with the importance and propriety of these views, that while it will receive with the most respectful consideration the expression of any different conviction which her Britannic Majesty's government may entertain, it will yet feel bound to instruct its consular and diplomatic officers in the East, that in China and Japan the judicial authority of the consuls of the United States will be considered as extending over all persons duly shipped and enrolled upon the articles of any merchant vessel of the United States, whatever be the nationality of such person. And all offences which would be justiciable by the consular courts of the United States, where the persons so offending are native born or naturalized citizens of the United States, employed in the merchant service thereof, are equally justiciable by the same consular courts in the case of seamen of foreign nationality."

The determination thus expressed was afterwards carried out by incorporating the doctrine into the permanent regu-



lations of the department for the guide of the consuls of this country. 72d regulation.

The views thus forcibly expressed present in our judgment the true status of the prisoner while an enlisted seaman on the American vessel, and give effect to the purpose of the treaty and the legislation of Congress. The treaty uses the term "Americans" in speaking of those who may be brought within the jurisdiction of the consular court for offences committed in Japan. The statute designates them as "citizens of the United States," and yet extends the laws of the United States, so far as they may be necessary to execute the treaty and are suitable to carry the same into effect, not only over all citizens of the United States in Japan, but also over "*all others* to the extent that the terms of the treaty justify or require."

Reading the treaty and statute together in view of the purpose designed to be accomplished, we are satisfied that it was intended by them to bring within our laws all who are citizens, and also all who, though not strictly citizens, are by their service equally entitled to the care and protection of the government. It is a canon of interpretation to so construe a law or a treaty as to give effect to the object designed, and for that purpose all of its provisions must be examined in the light of attendant and surrounding circumstances. To some terms and expressions a literal meaning will be given, and to others a larger and more extended one. The reports of adjudged cases and approved legal treatises are full of illustrations of the application of this rule. The inquiry in all such cases is as to what was intended in the law by the legislature, and in the treaty by the contracting parties.

In *Geofroy v. Riggs*, 133 U. S. 258, which was before this court at the last term, it was held that the District of Columbia, as a political community, is one of "the States of the Union," within the meaning of that term as used in the consular convention of 1853 with France; such



construction being necessary to give consistency to the provisions of the convention, and not defeat the consideration given to France for her concession of certain rights to citizens of the United States. And in the present case, to carry out the intention of the treaty and statute in question, they will be construed to apply to all parties who are by public law, or the law of the country, entitled to be treated for the time, from their employment and service, as citizens. There are many adjudications to the effect that such character will be ascribed to parties and they be held liable to all its consequences, and entitled to all its benefits, on other grounds than birth or naturalization.

A statute to Henry VIII enacted that if anybody should rob or take "the goods of the king's subjects within this realm," and be found guilty, the party robbed should have restitution of the goods. Of this statute Sir Matthew Hale said that "though it speaks of the king's subjects, it extends to aliens robbed; for though they are not the king's natural born subjects, they are the king's subjects when in England, by local allegiance." 1 Hale's Pleas of the Crown, p. 542.

In *United States v. Holmes*, 5 Wheat. 412, which is in point in the case before us, certain parties were indicted in the Circuit Court of the United States for the District of Massachusetts and convicted of murder on the high seas. It appeared that a vessel, apparently Spanish, was captured by privateers from Buenos Ayres, and a prize crew was put on board, of whom the prisoners were a part. One of them was a citizen of the United States and the others were foreigners. The crime was committed by drowning the person, whose death was charged, by the prisoners driving or throwing him overboard. On motion for a new trial certain questions arose on which the judges were divided in opinion. One of these was, whether it made any difference as to the point of jurisdiction, whether the prisoners or any of them were citizens of the United States, or that the

offence was committed, not on board of any vessel, but on the high seas. The court said that the question contained two propositions; one as to the national character of the offender and the person against whom the offence was committed; and second as to the place where it was committed. In respect to the first the court was of the opinion that it made no difference whether the offender was a citizen of the United States or not; adding, "if it (the offence) be committed on board of a foreign vessel by a citizen of the United States, or on board of a vessel of the United States by a foreigner, the offender is to be considered, *pro hac vice*, and in respect to this subject, as belonging to the nation under whose flag he sails."

The case of *The Queen v. Anderson*, L. R. 1 Crown Cases Reserved, 161, is still more in point. There one James Anderson, an American citizen, was indicted at the Central Criminal Court in England for murder on board a vessel belonging to the port of Yarmouth, in Nova Scotia; she was registered in London, and was sailing under the British flag. At the time the offence was committed the vessel was in the river Garonne, within the boundaries of the French Empire, on her way up to Bordeaux, which city is by the course of the river about ninety miles from the open sea. The vessel had proceeded about half way up the river, and was at the time of the offence about 300 yards from the nearest shore, the river at that place being about half a mile wide. The tide flows up to the place and beyond it. The prisoner was convicted, and the case was reserved for the opinion of the court. It was contended on behalf of the prisoner that the court had no jurisdiction in the case because he was an American citizen and in a foreign country at the time the offence was committed; and also that section 267 of the Merchant Shipping Act, which it was said the Crown relied upon at the trial, applied only to British seamen. Mr. Justice Blackburn in regard to this last statement observed: "The expression, British sea-

man, may mean one who, whatever his nationality, is serving on board a British ship," and also that it had been decided "that a ship, which bears a nation's flag, is to be treated as a part of the territory of that nation. A ship is a kind of floating island." Counsel answered that if it floated into the territory of another nation it would cease to be so, and the jurisdiction of the flag would then be excluded, and that the man might have been tried in France; to which Chief Justice Bovill replied: "Even if he might, why should not this country legislate to regulate the conduct of those on board its own vessels, or so as to have concurrent jurisdiction?" All the judges concurred in sustaining the conviction. In giving his opinion the Chief Justice said:

"There is no doubt that the place where the offence was committed was within the territory of France, and that the prisoner was, therefore, subject to the laws of France, which that nation might enforce if they thought fit; but at the same time he was also within a British merchant vessel, on board that vessel as a part of the crew, and, as such, he must be taken to have been under the protection of the British law, and also amenable to its provisions. It is said that the prisoner was an American citizen, but he had embarked by his own consent on board a British ship, and was at the time a portion of its crew. There are many observations to be found in various writers to show that in some instances, though subject to American law as a citizen of America, and to the law of France as being found within French territory, yet that he must also be considered as being within British jurisdiction as forming a part of the crew of a British vessel, upon the principle, that the jurisdiction of a country is preserved over its vessels, though they may be in ports or rivers belonging to another nation." p. 165.

Mr. Justice Blackburn said: "Where a nation allows a vessel to sail under her flag, and the crew have the protec-



tion of that flag, common sense and justice require that they should be punishable by the law of the flag." p. 170.

The views expressed by the Department of State, quoted above, are in harmony with the doctrine uniformly asserted by our government against the claim by England of a right to take its countrymen from the deck of an American merchant vessel and press them into its naval service. It is a part of our history that the assertion of this claim, and its enforcement in many instances, caused a degree of irritation among our people which no conduct of any other country has every produced. Its enforcement was deemed a great indignity upon this country and a violation of our right of sovereignty, our vessels being considered as parts of our territory. It led to the War of 1812, and although that war closed without obtaining a relinquishment of the claim, its further assertion was not attempted. At last, in a communication by Mr. Webster, then Secretary of State, to Lord Ashburton, the special British minister to this country, on the 8th of August, 1842, the claim was repudiated, and the announcement made that it would no longer be allowed by our government and must be abandoned. The conclusion of Mr. Webster's communication bears upon the question before us. After referring to the claim of Great Britain, and demonstrating the injustice of the position and its violation of national rights, he said: "In the early disputes between the two governments, on this so long-contested topic, the distinguished person to whose hands were first intrusted the seals of this department declared, that 'the simplest rule will be, that the vessel being American shall be evidence that the seamen on board are such.' Fifty years' experience, the utter failure of many negotiations, and a careful reconsideration now had of the whole subject at a moment when the passions are laid, and no present interest or emergency exists to bias the judgment, have convinced this government that this is not only the simplest and best, but the only rule which can be adopted



and observed consistently with the rights and honor of the United States, and the security of their citizens. That rule announces, therefore, what will hereafter be the principle maintained by their government. In every regularly documented American merchant vessel, the crew who navigate it will find their protection in the flag which is over them." Webster's Works, Vol. VI, p. 325.

This rule, that the vessel being American is evidence that the seamen on board are such, is now an established doctrine of this country; and in support of it there is with the American people no diversity of opinion and can be no division of action.

We are satisfied that the true rule of construction in the present case was adopted by the Department of State in the correspondence with the English government, and that the action of the consular tribunal in taking jurisdiction of the prisoner Ross, though an English subject, for the offence committed, was authorized. While he was an enlisted seaman on the American vessel, which floated the American flag, he was, within the meaning of the statute and the treaty, an American, under the protection and subject to the laws of the United States equally with the seaman who was native born. As an American seaman he could have demanded a trial before the consular court as a matter of right, and must therefore be held subject to it as a matter of obligation.

We have not overlooked the objection repeatedly made and earnestly pressed by counsel, that the consular tribunal is a court of limited jurisdiction. It is undoubtedly a court of that character, limited by the treaty and the statutes passed to carry it into effect, and its jurisdiction cannot be extended beyond their legitimate meaning. But their construction is not, therefore, to be so restricted as to practically defeat the purposes to be accomplished by the treaty, but rather so as to give it full operation, in order that it may not be a vain and nugatory act.

It is true that the occasion for consular tribunals in Japan may hereafter be less than at present, as every year that country progresses in civilization and in the assimilation of its system of judicial procedure to that of Christian countries, as well as in the improvement of its penal statutes; but the system of consular tribunals which have a general similarity in their main provisions, is of the highest importance, and their establishment in other than Christian countries, where our people may desire to go in pursuit of commerce, will often be essential for the protection of their persons and property.

We have not considered the objection to the discharge of the prisoner on the ground that he accepted the conditional pardon of the President. If his conviction and sentence were void for want of jurisdiction in the consular tribunal, it may be doubtful whether he was estopped, by his acceptance of the pardon, from assailing their validity; but into that inquiry we need not go, for the consular court having had jurisdiction to try and sentence him, there can be no question as to the binding force of the acceptance.

*Order affirmed.*









ILLINOIS CENTRAL RAILROAD COMPANY *v.*  
ILLINOIS.

CHICAGO *v.* ILLINOIS CENTRAL RAILROAD  
COMPANY.

ILLINOIS *v.* ILLINOIS CENTRAL RAILROAD  
COMPANY.

APPEALS FROM THE CIRCUIT COURT OF THE UNITED STATES FOR  
THE NORTHERN DISTRICT OF ILLINOIS.

Nos. 419, 608, 609. Argued October 12, 13, 14, 1892. — Decided December 5, 1892.

The ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States.

The same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which

## Syllabus.

obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations.

The roadway of the Illinois Central Railroad at Chicago as constructed, two hundred feet in width, for the whole distance allowed for its entry within the city, with the tracks thereon, and with all the guards against danger in its approach and crossings, and the breakwater beyond its tracks on the east, and the necessary works for the protection of the shore on the west, in no respect interfere with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic; and, as they were constructed under the authority of the law, (Stat. of February 17, 1851, Laws Ill. 1851, 192,) by the requirement of the city as a condition of its consent that the company might locate its road within its limits, (Ordinance of June 14, 1852,) they cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use.

The Illinois Central Railroad Company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated — the construction and operation of a railroad thereon, with one or more tracks and works, in connection with the road or in aid thereof.

That company acquired by the construction of its road and other works no right as a riparian owner to reclaim still further lands from the waters of the lake for its use, or for the construction of piers, docks and wharves in the furtherance of its business; but the extent to which it could reclaim the land under water was limited by the conditions of the ordinance of June 14, 1852, which was simply for the construction of a railroad on a track not to exceed a specified width, and of works connected therewith.

The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights.

The railroad company owns and has the right to use in its business the reclaimed land and the slips and piers in front of the lots on the lake north of Randolph Street which were acquired by it, and in front of Michigan Avenue between the lines of Twelfth and Sixteenth streets, extended, unless it shall be found by the Circuit Court on further examination, that the piers as constructed extend beyond the point of navigability in the waters of the lake; about which this court is not fully satisfied from the evidence in this case.

The railroad company further has the right to continue to use, as an addi-

## Statement of the Case.

tional means of approaching and using its station-grounds, the spaces and the rights granted to it by the ordinances of the city of Chicago of September 10, 1855, and of September 15, 1856.

The act of the Legislature of Illinois of April 16, 1869, granting to the Illinois Central Railroad Company, its successors and assigns, "all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the roundhouse and machine shops of said company, in the south division of the said city of Chicago," cannot be invoked so as to extend riparian rights which the company possessed from its ownership of lands in sections 10 and 15 on the lake; and as to the remaining submerged lands, it was not competent for the legislature to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; and the attempted cession by the act of April 16, 1869, was inoperative to affect, modify, or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, and any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective.

There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

The fee of the made or reclaimed ground between Randolph street and Park Row, embracing the ground upon which rest the tracks and the breakwater of the railroad company south of Randolph street, is in the city, and subject to the right of the railroad company to its use of the tracks on ground reclaimed by it and the continuance of the breakwater, the city possesses the right of riparian ownership, and is at full liberty to exercise it.

The city of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph street and the north line of block twenty-three, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves, docks and levees, subject, however, in the execution of that power, to the authority of the State to prescribe the lines beyond which piers, docks, wharves and other structures, other than those erected by the general government, may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise.

IN EQUITY. These appeals were taken from a decree in a bill or information filed by the State of Illinois against the

## Statement of the Case.

Illinois Central Railroad Company, the City of Chicago, and the United States, and a cross bill therein filed by the city against the Railroad Company, the United States and the State. 33 Fed. Rep. 730. The object of the litigation was to determine the rights, respectively, of the State, of the city, and of the Railroad Company in land, submerged or reclaimed, in front of the water line of the city on Lake Michigan.

As the record came to this court the cause was further entitled "*The United States Appellant v. The People of the State of Illinois et al.*, No. 610." On the suggestion of the Solicitor General that the United States had never been a party to these suits in the court below, and had never taken an appeal from the decree, that title was dropped from the opinion of the court.

The facts were stated by Mr. Justice Harlan in his opinion in the court below, as follows:<sup>1</sup>

It is necessary to a clear understanding of the numerous questions presented for determination, that we should first trace the history of the title to these several bodies of lands up to the time when the Illinois Central Railroad was located within the limits of Chicago.

First. *As to the lands embraced in the Fort Dearborn Reservation.*

In the year 1804 the United States established the military

---

<sup>1</sup> This court, in its opinion, *infra*, 434, says of this statement: "We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company. And the court, in its elaborate opinion, 33 Fed. Rep. 730, for that purpose referred to the legislation of the United States and of the State, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed and are satisfied with its entire accuracy. It would, therefore, serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated." After this full endorsement, the Reporter has thought it his duty to make use of this statement, making such few changes, mostly verbal, as have been found necessary to adapt it to the issues settled by the opinion of the court in this case.



## Statement of the Case.

post of Fort Dearborn, immediately south of Chicago River, and near its mouth, upon the southwest fractional quarter of section 10. It was occupied by troops as well when Illinois, in 1818, was admitted into the Union, as when Congress passed the act of March 3, 1819, authorizing the sale of certain military sites. By that act it was provided :

“That the Secretary of War be, and he is hereby, authorized, under the direction of the President of the United States, to cause to be sold such military sites, belonging to the United States, as may have been found, or become, useless for military purposes. And the Secretary of War is hereby authorized, on the payment of the consideration agreed for, into the treasury of the United States to make, execute and deliver all needful instruments conveying and transferring the same in fee ; and the jurisdiction, which had been specially ceded, for military purposes, to the United States, by a State, over such site or sites, shall thereafter cease. 3 Stat. 520, c. 88.

In 1824, upon the written request of the Secretary of War, the southwest quarter of fractional section 10, containing about 57 acres, and within which Fort Dearborn was situated, was formally reserved by the Commissioner of the General Land Office from sale and for military purposes. *Wilcox v. Jackson*, 13 Pet. 498, 502. The United States admit, and it is also proved, that the lands so reserved were subdivided in 1837 by authority of the Secretary—he being represented by one Matthew Birchard, as special agent and attorney for that purpose—into blocks, lots, streets and public grounds called the “Fort Dearborn Addition to Chicago.” And on the 7th day of June, 1839, a map or plat of that addition was acknowledged by Birchard, as such agent and attorney, and was recorded in the proper local office. A part of the ground embraced in that subdivision was marked on the record plat “Public ground forever to remain vacant of buildings.”

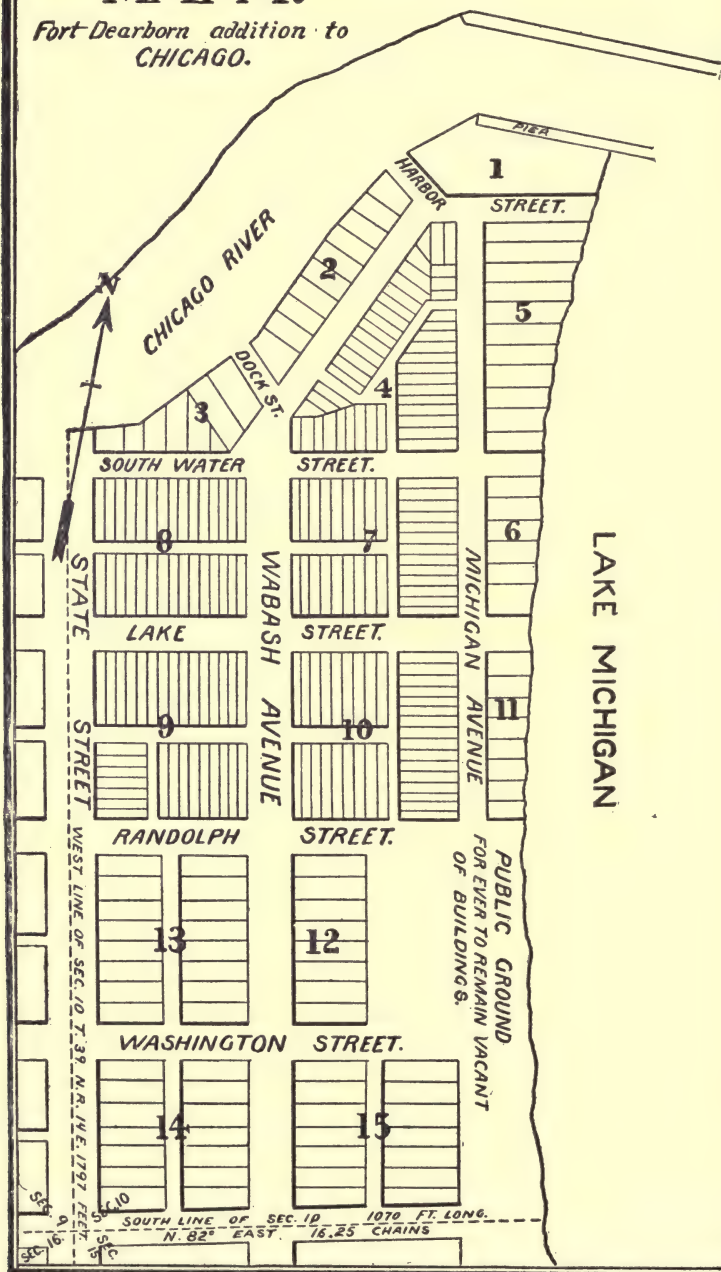
The plat of that subdivision is substantially reproduced on page 392, as Map A.

The lots designated on this plat were sold and conveyed by the United States to different purchasers. The United States expressly reserved from sale all of the Fort Dearborn Addition



# MAP A.

Fort Dearborn addition to  
CHICAGO.



## Statement of the Case.

(including the ground marked for streets) north of the south line of lot 8 in block 2, lots 4 and 9 in block 4, and lot 5 in block 5, projecting said lines across the adjacent streets. The grounds so specially reserved remained in the occupancy of the General Government for military purposes from 1839 until after 1845. The legal effect of that occupancy appears in *United States v. Chicago*, 7 How. 185. The city of Chicago having proposed, in 1844, to open Michigan Avenue through the lands so reserved from sale, notwithstanding, at the time, they were in actual use for military purposes, the United States instituted a suit in equity to restrain the city from so doing. It appeared in the case that the agent of the General Government gave notice, at the time of selling the other lots, that the ground in actual use by the United States was not then to be sold. It also appeared that the act of March 4, 1837, incorporating the city of Chicago, and designating the district of country embraced within its limits expressly excepted "the southwest fractional quarter of section 10, occupied as a military post, until the same shall become private property." Ill. Laws, 1837, pp. 38, 74.

The court held that the city had no right to open streets through that part of the ground which, although laid out in lots and streets, had not been sold by the government; that its corporate powers were limited to the part which, by sale, had become private property; and that the streets laid out and dedicated to public use by Birchard, the agent of the Secretary of War, did not, merely by his surveying the land into lots and streets, and making and recording a map or plat thereof, convey the legal estate in such streets to the city, and thereby authorize it to open them for public use, and assume full municipal control thereof. The court held to be untenable the claim of the city that "because streets had been laid down on the plan by the agent [Birchard] part of which extended into the land not sold, those parts had, by this alone, become dedicated as highways and the United States had become estopped to object." Further: "It is entirely unsupported by principle or precedent, that an agent, *merely by protracting on the plan* those streets into the reserved line and amidst lands not sold,

## . Statement of the Case.

nor meant then to be sold, but expressly reserved, could deprive the United States of its title to real estate, and to its important public works." See also *Irwin v. Dixion*, 9 How. 9, 31.

Second. *As to the lands in controversy embraced in Fractional Section 15.*

This section is on the lake shore, immediately south of section 10. The particular lands, the history of the title to which is to be now examined, are between the west line of the street now known as Michigan Avenue and the roadway or way-ground of the Illinois Central Railroad Company, and between the middle line of Madison street and the middle line of Twelfth street, excluding what is known as Park Row or block 23, north of Twelfth street.

By an act of the Illinois legislature of February 14, 1823, entitled "An act to provide for the improvement of the internal navigation of this State," certain persons were constituted commissioners to devise and report upon measures for connecting, by means of a canal and locks, the navigable waters of the Illinois River and Lake Michigan. Ill. Laws, 1823, p. 151. This was followed by an act of Congress, approved March 2, 1827, entitled "An act to grant a quantity of land to the State of Illinois, for the purpose of aiding in opening a canal to connect the waters of the Illinois River with those of Lake Michigan," granting to this State, for the purposes of such enterprise, a quantity of land, equal to one-half of five sections in width, on each side of the proposed canal (reserving each alternate section to the United States), to be selected by the Commissioner of the General Land Office, under direction of the President; said lands to be "subject to the disposal of the said State for the purpose aforesaid, and for no other;" and said canal to remain forever a public highway for the use of the national government, free from any charge for any property of the United States passing through it. 4 Stat. 234, c. 51.

The power of the State to dispose of these lands was further recognized or conferred by the third section of the act, as follows: SEC. 3. "That the said State, under the authority of the legislature thereof, after the selection shall have been so made,

## Statement of the Case.

shall have power to sell and convey the whole or any part of the said land, and to give a title in fee simple therefor to whomsoever shall purchase the whole or any part thereof." 4 Stat. 234.

By an act of the Illinois legislature of January 22, 1829, entitled "An act to provide for constructing the Illinois and Michigan Canal," the commissioners for whose appointment that act made provision were directed to select, in conjunction with the Commissioner of the General Land Office, the alternate sections of land granted by the act of Congress, such commissioners being invested with the power, among others, "to lay off such parts of said donation into town lots as they may think proper, and to sell the same at public sale in the same manner as is provided in this act for the sale of other lands." Ill. Laws, 1829.

The act of 1829 was amended February 15, 1831, so as to constitute the Canal Commissioners a board to be known as the "Board of Canal Commissioners of the Illinois and Michigan Canal," with authority to contract and be contracted with, sue and be sued, plead and be impleaded, and with power of control in all matters relating to said canal. Ill. Laws, 1830, 1831, 39.

Pursuant to and in conformity with said acts of Congress and of the legislature of Illinois, the selection of lands for the purposes specified was made by the proper authorities, and approved by the President on the 21st of May, 1830. Among the lands so selected was said fractional section 15.

By an act of the Illinois legislature, approved January 9, 1836, entitled "An act for the construction of the Illinois and Michigan Canal," the Governor was empowered to negotiate a loan of not exceeding \$500,000, on the credit and faith of the State, as therein provided, for the purpose of aiding, in connection with such means as might be received from the United States, in the construction of the Illinois and Michigan Canal, for which loan should be issued certificates of stock, to be called the "Illinois and Michigan Canal stock," signed by the Auditor and countersigned by the Treasurer, bearing an interest not exceeding six per cent, payable semi-annually, and "reimburs-



## Statement of the Case.

able" at the pleasure of the State at any time after 1860, and for the payment of which, principal and interest, the faith of the State was irrevocably pledged. The same act provided for the appointment of three commissioners to constitute a board to be known as "The Board of Commissioners of the Illinois and Michigan Canal," and to be a body politic and corporate, with power to contract and be contracted with, sue and be sued, plead and be impleaded, in all matters and things relating to them as canal companies, and to have the immediate care and superintendence of the canal and all matters relating thereto. Ill. Laws, 1836, 145.

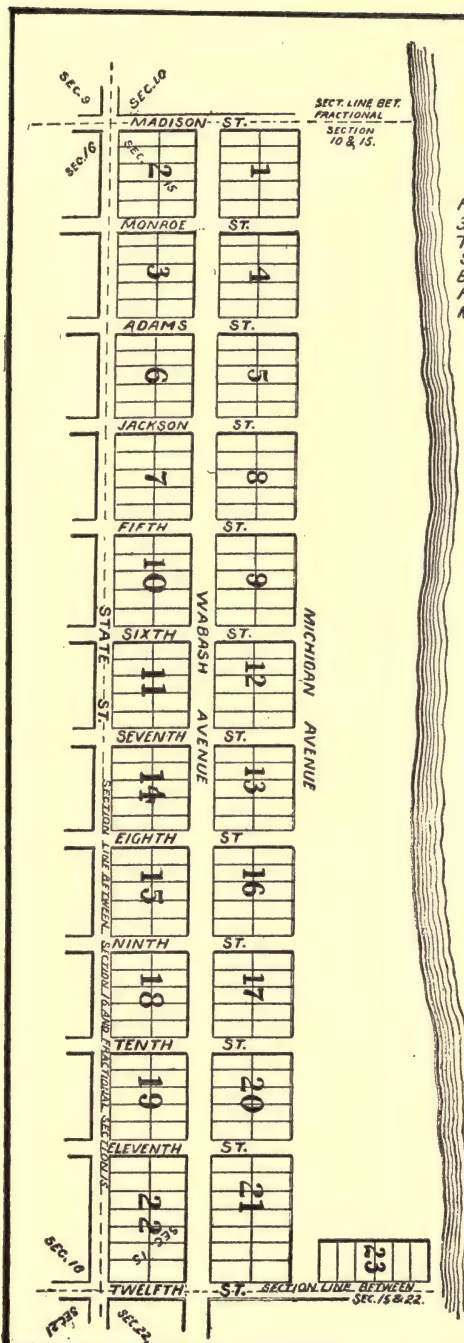
That act contained, among other provisions, the following:

"SEC. 32. The commissioners shall examine the whole canal route, and select such places thereon as may be eligible for town sites, and cause the same to be laid off into town lots, and they shall cause the canal lands in or near Chicago, suitable therefor, to be laid off into town lots.

"SEC. 33. And the said Board of Canal Commissioners shall, on the twentieth day of June next, proceed to sell the lots in the town of Chicago, and such parts of the lots in the town of Ottawa, as also fractional section Fifteen adjoining the town of Chicago, it being first laid off and subdivided into town lots, streets and alleys, as in their best judgment will best promote the interest of the said canal fund: *Provided, always*, That before any of the aforesaid town lots shall be offered for sale, public notice of such sale shall have been given." . . . Ill. Laws, 1836, 150. The revenue arising from the canal, and from any lands granted by the United States to the State for its construction, together with the net tolls thereof, were pledged by the act for the payment of the interest accruing on the said stock, and for the reimbursement of the principal of the same. *Ibid.* § 41, 153.

In 1836 the Canal Commissioners, under the authority conferred upon them by the statutes above recited, caused fractional section 15 to be subdivided into lots, blocks, streets, etc., a map whereof was made, acknowledged and recorded on the 20th of July, 1836, which map is substantially reproduced on page 397 as Map B.





## MAP B.

FRACTIONAL SECTION No 16 T<sup>p</sup>.  
39 NORTH RANGE 14 EAST OF THE  
THIRD PRINCIPAL MERIDIAN  
SURVEYED AND SUBDIVIDED BY THE  
BOARD OF CANAL COMMISSIONERS,  
PURSUANT TO LAWS IN THE  
MONTH OF APRIL AD. 1836.

LAKE MICHIGAN

## Statement of the Case.

At the time this map was made and recorded fractional sections 15 and 10 were both within the limits of the "Town" of Chicago, except that by the act of February 11, 1835, changing the corporate powers of that town, it was provided "that the authority of the Board of Trustees of the said Town of Chicago shall not extend over the south fractional section 10 until the same shall cease to be occupied by the United States." Ill. Laws, 1835, p. 204. But, prior to the survey and recording of the plat of fractional section 10, to wit, by the act of March 4, 1837, the city of Chicago was incorporated, and its limits defined (excluding, as we have seen, "the southwest fractional quarter of section 10, occupied as a military post, until the same shall become private property,") and was invested with all the estate, real and personal, belonging to or held in trust by the trustees of the town; its common council being empowered to lay out, make and assess streets, alleys, lanes and highways in said city, to make wharves and slips at the end of the streets, on property belonging to said city, and to alter, widen, straighten and discontinue the same. Ill. Laws, 1837, 61, § 38; 74, § 61.

Congress having, by an act approved September 20, 1850, 9 Stat. 466, c. 51, made a grant of land to Illinois for the purpose of aiding the construction of a railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi Rivers, with branches to Chicago and Dubuque, the Illinois Central Railroad Company was incorporated February 10, 1851, and was made the agent of the State to construct that road. Private Laws Ill. 1851, 61. It was granted power by its charter, Sec. 3, "to survey, locate, construct, complete, alter, maintain and operate a railroad, with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan Canal, to a point at the city of Cairo, with a branch of the same to the city of Chicago, on Lake Michigan; and also a branch, via the city of Galena, to a point on the Mississippi River, opposite the town of Dubuque, in the State of Iowa." In addition to certain powers, privileges, immunities and franchises—including the right to purchase, hold and convey real and personal

## Statement of the Case.

estate, which might be needful to carry into effect the purposes and objects of its charter — it was provided that the company “shall have the right of way upon, and may appropriate to its sole use and control, for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of, and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purposes of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges, belonging to the State, are hereby granted to said corporation for said purposes: . . . *Provided*, That nothing in this section contained shall be so construed as to authorize the said corporation to interrupt the navigation of said streams.” But the company’s charter also provided (Sec. 8): “Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city.”

Such consent was given by an ordinance of the common council of Chicago, adopted June 14, 1852, whereby permission was granted to the company to lay down, construct and maintain within the limits of that city, and along the margin of the lake within and adjacent to the same, a railroad with one or more tracks, and to have the right of way and all powers incident to and necessary therefor, upon certain terms and conditions, to wit: “The said road shall enter at or near the intersection of its southern boundary with Lake Michigan, and, following the shore on or near the margin of said lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section fifteen, and continue northerly across the open space in front of said section fifteen to such grounds as the said company may acquire between the north line of Randolph Street and the Chicago River, in the Fort Dearborn addition in said city, upon which said grounds shall be located the depot of said railroad within the city, and such other build-

## Statement of the Case.

ings, slips or apparatus as may be necessary and convenient for the business of said company. But it is expressly understood that the city of Chicago does not undertake to obtain for said company any right of way, or other right, privilege or easement, not now in the power of said city to grant or confer, or to assume any liability or responsibility for the acts of said company." Section 1.

By other sections of the ordinance it was provided as follows :

By the second section, that the company might "enter upon and use in perpetuity for its said line of road, and other works necessary to protect the same from the lake, a width of 300 feet, from the southern boundary of said public ground near Twelfth street, to the northern line of Randolph street—the inner or west line of the ground to be used by said company to be not less than 400 feet east from the west line of Michigan Avenue and parallel thereto ;"

By the third section, that they "may extend their works and fill out into the lake to a point in the southern pier not less than 400 feet west from the present east end of the same, thence parallel with Michigan Avenue to the north line of Randolph street extended ; but it is expressly understood that the common council does not grant any right or privilege beyond the limits above specified, nor beyond the line that may be actually occupied by the works of said company ;"

By the sixth section, that the company "shall erect and maintain on the western or inner line of the ground pointed out for its main track on the lake shore, as the same is hereinbefore defined, such suitable walls, fences or other sufficient works, as will prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger, said structure to be of suitable materials and slightly appearance, and of such heights as the common council may direct, and no change thereon shall be made except by mutual consent: *Provided*, That the company shall construct such suitable gates at proper places at the ends of the streets, which are now or may hereafter be laid out, as may be required by the common council, to afford safe access to the lake; *And provided, also*, That, in case of the construction of an outside



## Statement of the Case.

harbor, streets may be laid out to approach the same, in the manner provided by law, in which case the common council may regulate the speed of locomotives and trains across them ;”

By the seventh section, that the company “shall erect and complete within three years after they shall have accepted this ordinance, and shall forever thereafter maintain, a continuous wall or structure of stone masonry, pier work or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan Avenue opposite thereto, from the north side of Randolph street to the southern bound of Lake Park before mentioned, at a distance of not more than 300 feet east from and parallel with the western or inner line, pointed out for said company, as specified in section two hereof, and shall continue said works to the southern boundary of the city, at such distance outside of the track of said road as may be expedient, which structure and works shall be of sufficient strength and magnitude to protect the entire front of said city, between the north line of Randolph street and its southern boundary, from further damage or injury from the action of the waters of Lake Michigan, and that part of the structure south of Lake Park shall be commenced and prosecuted with all reasonable despatch after acceptance of this ordinance ;”

By the eighth section, that the company “shall not in any manner, nor for any purpose whatever, occupy, use or intrude upon the open ground known as Lake Park, belonging to the city of Chicago, lying between Michigan Avenue and the western or inner line before mentioned, except so far as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground ;”

By the ninth section, that the company “shall erect no buildings between the north line of Randolph street and the south line of the said Lake Park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of or for making up or distributing their trains, nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor



## Statement of the Case.

suffer their locomotives, cars or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks and protection of the same."

The company was given ninety days within which to accept the ordinance, and it was provided that upon such acceptance its terms should be embodied in a contract between the city and the company. The ordinance was accepted, and the required agreement entered into on the 8th day of July, 1852.

At the time this ordinance was passed the harbor of the city included, under the laws of the State incorporating the city, "the piers and so much of Lake Michigan as lies within the distance of one mile thereof into the lake, and the Chicago River and its branches to their respective sources." Private Laws Ill. 2d Sess. 1851, pp. 132, 147. Its common council had power, at the public expense, to construct a breakwater or barrier along the shore of the lake for the protection of the city against the encroachments of the water; "to preserve the harbor; to prevent any use of the same, or any act in relation thereto . . . tending in any degree to fill up or obstruct the same; to prevent and punish the casting or depositing therein any earths, ashes or other substance, filth, logs or floating matter; to prevent and remove all obstructions therein, and to punish the authors thereof; to regulate and prescribe the mode and speed of entering and leaving the harbor, and of coming to and departing from the wharves and streets of the city by steamboats, canal boats, and other crafts and vessels, . . . and to regulate and prescribe by such ordinances, or through their harbor master, or other authorized officer, such a location of every canal boat, steamboat, or other craft or vessel or float, and such changes of station in, and use of, the harbor, as may be necessary to promote order therein, and the safety and equal convenience, as near as may be, of all such boats, vessels, crafts or floats;" "to remove and prevent all obstructions in the waters which are public highways in said city, and to widen, straighten and deepen the same;" and to "make wharves and slips at the end of streets, and alter, widen, contract, straighten and discontinue the same." *Ibid.*

## Statement of the Case.

Under the authority of its charter, and of the ordinance of June 14, 1852, the railroad company located its tracks within the corporate limits of the city. The tracks northward from Twelfth street were laid upon piling placed in the waters of the lake, the shore line, which was crooked, being, at that time, at Park Row, about 400 feet from the west line of Michigan Avenue; at the foot of Monroe and Madison streets, about 90 feet; and at Randolph street, about  $112\frac{1}{2}$  feet. Since that time the space between the shore line and the tracks of the railroad company has been filled with earth by or under the direction of the city, and is now solid ground. After the construction of the track as just stated, the railroad company erected a breakwater east of its roadway, upon a line parallel with the west line of Michigan Avenue, and, subsequently, filled the space, or nearly all of it, between that breakwater and its tracks, and under its tracks, with earth and stone.

It is stated by counsel, and the record, we think, sufficiently shows, that when the road was located in 1852 nearly all of the lots bordering upon the lake, north of Randolph street, had become the property of individuals, by purchase from the United States, except a parcel adjacent to the river which had not then been sold by the General Government. Soon thereafter the company acquired the title to all of the water lots in the Fort Dearborn addition, north of Randolph street, including the remaining parcel belonging to the United States. The deed for the latter was made by the Secretary of War, October 14, 1852, and included "all the accretions made or to be made by said lake and river in front of the land hereby conveyed, and all other rights and privileges appertaining to the United States as owners of said land." The company established its passenger house at the place designated in the ordinance of 1852, and, being the owner of said water lots, north of Randolph street, it gradually pushed its works out into the shallow water of the lake to the exterior line specified in that ordinance, 1376 feet east of the west line of Michigan Avenue.

In order that the railroad company might approach its passenger depot, the common council, by ordinance, adopted

## Statement of the Case.

September 10, 1855, granted it permission to curve its tracks westwardly of the line fixed by the ordinance of 1852, "so as to cross said line at a point not more than 200 feet south of Randolph street, extending and curving said tracks northwesterly as they approach the depot, and crossing the north line of Randolph street, extended, at a point not more than 100 feet west of the line fixed by the ordinance, in accordance with the map or plat thereof submitted by said company and placed on file for reference." This grant was, however, upon the following conditions: That the company lay out upon its own land, west of and alongside its passenger house, a street 50 feet wide, extending from Water street to Randolph street, and fill the same up its entire length within two years from the passage of said ordinance; that it should be restricted in the use of its tracks south of the north line of Randolph street, as provided in the ordinance of 1852; and "when the company shall fill up its said tracks south of the north line of that street down to the point where said curves and side-tracks commence, and the city shall grant its permission so to fill up its tracks, it should also fill up, at the same time and to an equal height, all the space between the track so filled up and the lake shore as it now exists, from the north side of Randolph street down to the point where said curves and side-tracks intersect the line fixed by the ordinance aforesaid."

The company's tracks were curved as permitted; the street referred to was opened and has ever since been used by the public; and the required filling was done.

It being necessary that the railroad company should have additional means of approaching and using its station grounds between Randolph street and the Chicago River, the city, by another ordinance adopted September 15, 1856, granted it permission "to enter and use in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its present [then] breakwater and a line drawn from a point on said breakwater 700 feet south of the north line of Randolph, extended, and running thence on a straight line to the southeast corner of its present breakwater, thence to the river: *Provided, however,* and this permission is



## Statement of the Case.

only given upon the express condition, that the portion of said line which lies south of the north line of Randolph street, extended, shall be kept subject to all the conditions and restrictions as to the use of the same, as are imposed upon that part of said line by the said ordinance of June 14, 1852.”

In 1867 the company made a large slip just outside of the exterior line fixed by the ordinance of 1852, thereby extending its occupancy, between Randolph street and Chicago River, further to the east. Along the outer edge of this pier a continuous line of dock piling was placed, extending on a line from the river to the north line of Randolph street, 1792 feet distant from the west line of Michigan Avenue. This line formed the company's breakwater between the river and Randolph street at the time of the passage, April 16, 1869, of what is known as the Lake Front Act; which was passed by the legislature over the veto of the governor, and which is printed in full in the margin. Laws of 1869, p. 245.

In view of the important questions raised, and of the rights asserted, under that act, it is here given in full: <sup>1</sup>

---

<sup>1</sup> “AN ACT in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago.

“SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That all right, title and interest of the State of Illinois in and to so much of fractional section fifteen (15), township thirty-nine (39), range fourteen (14) east of the third (3d) principal meridian, in the city of Chicago, county of Cook, and State of Illinois, as is situated east of Michigan Avenue and north of Park Row, and south of the south line of Monroe street, and west of a line running parallel with and four hundred feet east of the west line of said Michigan Avenue—being a strip of land four hundred feet in width, including said avenue along the shore of Lake Michigan, and partially submerged by the waters of said lake—are hereby granted, in fee, to the said city of Chicago, with full power and authority to sell and convey all of said tract east of said avenue, leaving said avenue ninety (90) feet in width, in such manner and upon such terms as the common council of said city may, by ordinance, provide: *Provided*, That no sale or conveyance of said property, or any part thereof, shall be valid unless the same be approved by a vote of not less than three-fourths of all the aldermen elect.

“§ 2. The proceeds of the sale of any and all of said lands shall be set aside, and shall constitute a fund, to be designated as the ‘Park Fund’ of

## Statement of the Case.

As early as May, 1869, the railroad company caused to be prepared a plan for an outer harbor at Chicago.

---

the said city of Chicago, and said fund shall be equitably distributed by the common council between the South Division, the West Division and the North Division of the said city, upon the basis of the assessed value of the taxable real estate of each of said divisions, and shall be applied to the purchase and improvement in each of said divisions, or in the vicinity thereof, of a public park, or parks, and for no other purpose whatsoever.

“§ 3. The right of the Illinois Central Railroad Company, under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed, and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the round-house and machine shops of said company, in the South Division of the said city of Chicago, are hereby granted, in fee, to the said Illinois Central Railroad Company, its successors and assigns: *Provided, however*, That the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same; and that all gross receipts from use, profits, leases or otherwise of said lands, or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: *And provided, also*, That nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the General Assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor: *And provided further*, That any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now, or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the



## Statement of the Case.

On the 12th of July of the same year the Illinois Central Railroad Company, the Michigan Central Railroad Company,

---

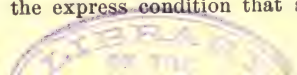
continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation.

“§ 4. All the right and title of the State of Illinois, in and to the lands, submerged or otherwise lying north of the south line of Monroe street, and south of the south line of Randolph street, and between the east line of Michigan Avenue and the track and roadway of the Illinois Central Railroad Company, and constituting parts of fractional sections ten (10) and fifteen (15) in said township thirty-nine (39), as aforesaid, are hereby granted, in fee, to the Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company, their successors and assigns, for the erection thereon of a passenger depot, and for such other purposes as the business of said company may require: *Provided*, That upon all gross receipts of the Illinois Central Railroad Company, from leases of its interest in said grounds, or improvements thereon, or other uses of the same, the per centum provided for in the charter of said company shall forever be paid in conformity with the requirements of said charter.

“§ 5. In consideration of the grant to the said Illinois Central, Chicago, Burlington and Quincy, and Michigan Central Railroad Companies of the land as aforesaid, said companies are hereby required to pay to said city of Chicago the sum of eight hundred thousand dollars, to be paid in the following manner, viz.: two hundred thousand dollars within three months from and after the passage of this act; two hundred thousand dollars within six months from and after the passage of this act; two hundred thousand dollars within nine months from and after the passage of this act; two hundred thousand dollars within twelve months from and after the passage of this act; which said sums shall be placed in the Park Fund of the said city of Chicago, and shall be distributed in like manner as is hereinbefore provided for the distribution of the other funds which may be obtained by said city from the sale of the lands conveyed to it by this act.

“§ 6. The common council of the said city of Chicago is hereby authorized and empowered to quitclaim and release to the said Illinois Central Railroad Company, the Chicago, Burlington and Quincy Railroad Company, and the Michigan Central Railroad Company any and all claim and interest in and upon any and all of said land north of the south line of Monroe Street, as aforesaid, which the said city may have by virtue of any expenditures and improvements thereon or otherwise, and in case the said common council shall neglect or refuse thus to quitclaim and release to the said companies, as aforesaid, within four months from and after the passage of this act, then the said companies shall be discharged from all obligation to pay the balance remaining unpaid to said city.

“§ 7. The grants to the Illinois Central Railroad Company contained in this act are hereby declared to be upon the express condition that said



## Statement of the Case.

and the Chicago, Burlington and Quincy Railroad Company, by an agent, tendered to Walter Kimball, the comptroller of the city of Chicago, the sum of \$200,000, as the first payment to the city under the fifth section of the act of 1869. He received the sum tendered upon the express condition that none of the city's rights be thereby waived, or its interest in any manner prejudiced, and placed the money in bank on special deposit, to await the action and direction of the common council. The matter being brought to the attention of that body, it adopted, June 13, 1870, a resolution, declaring that the city "will not recognize the act of Walter Kimball in receiving said money, as binding upon the city, and that the city will not receive any money from railroad companies, under said act of the General Assembly, until forced to do so by the courts." The city never quitclaimed or released, nor offered to quitclaim or release, to said companies or to either of them, any right, title, claim or interest in or to any of the land described in the act of 1869, nor was Kimball's act in receiving the money ever recognized by the city as binding upon it. On the expiration of his term of office he did not turn the money over to his successor in office, but kept it deposited in bank to his own individual credit, and so kept it until some time during the year 1874, or later, when, upon application by the railroad companies, he returned it to them. No other money than the \$200,000 delivered to Kimball was ever tendered by the railroad companies, or either of them, to the city or to any of its officers.

At a meeting of the Board of Directors of the Illinois Central Railroad Company, held at the company's office in New York, July 6, 1870, a resolution was adopted to the effect "that this company accepts the grants under the act of the

---

Illinois Central Railroad Company shall perpetually pay into the Treasury of the State of Illinois the per centum on the gross or total proceeds, receipts or income derived from said road and branches stipulated in its charter, and also the per centum on the gross receipts of said company reserved in this act.

"§ 8. This act shall be a public act and in force from and after its passage."

## Statement of the Case.

legislature at its last session, and that the president give notice thereof to the State, and that the company has commenced work upon the shore of the lake at Chicago under the grants referred to." On the 17th of November, 1870, its president communicated a copy of this resolution to the Secretary of State of Illinois, and gave the notice therein required, adding: "You will please regard the above as an acceptance by this company of the above-mentioned law [Lake Front Act], and it is desired by said company that said acceptance shall remain permanently on file and of record in your office." The Secretary of State replied, under date of November 18, 1870: "Yours of the 17th inst., being a notice of the acceptance by the Illinois Central Railroad Company of the grants under an act of the legislature of Illinois, in force April 16, 1869, was this day received and filed and duly recorded in the records of this office."

Following these transactions were certain proceedings, commenced about July 1, 1871, by information filed in the Circuit Court of the United States for that District by the United States against the Illinois Central Railroad Company. That information set forth that Congress, in order to promote the convenience and safety of vessels navigating Lake Michigan, had, from time to time, appropriated and expended large sums of money in and about the mouth of Chicago River, and had constructed two piers extending from the north and south banks of that river eastwardly for a considerable distance into the lake; that, in July, 1870, it appropriated a large sum of money to construct an outer harbor at Chicago, in accordance with the plans of the Engineer Department of the United States; that the railroad company had, from time to time, wrongfully filled up with earth a portion of said lake, within said harbor; that what the company had then done, in that way, and what it intended to do, unless prevented, would materially interfere with the execution of the plan of improvement adopted by the War Department. A temporary injunction was issued against the company. Subsequently, in 1872, the parties to that suit entered into a stipulation, from which it appears that the matters referred to in said information,



## Statement of the Case.

relating to the construction of docks and wharves in the basin or outer harbor of the city, formed by the breakwater then in process of erection by the United States, were referred to the War Department, and that the Secretary, upon the recommendation of engineer officers, approved certain lines, limiting the construction of docks and wharves in said outer harbor, to wit: commencing at the pier on the south side of the entrance to the Chicago River, 1200 feet west of the government breakwater; thence south to an intersection with the north line of Randolph street extended eastwardly; thence due west 800 feet; and thence south to the east and west breakwater proposed to be constructed by the United States 4000 feet south of the pier first above mentioned, the line so established being fixed as the line to which docks and wharves may be extended by parties entitled to construct them within said outer harbor. The railroad company desiring to proceed, under the supervision of the Engineer Bureau of the United States, with the construction of docks and wharves within the proposed outer harbor, between the pier on the south side of the entrance to Chicago River and the north line of Randolph street, extended eastwardly in conformity with the said limiting lines, and having agreed to observe said lines, as well as the directions which might be given, in reference to the construction of said docks and wharves, by the proper officers of said bureau, the injunctive order, pursuant to stipulation between the parties, was, January 16, 1872, vacated, and the information dismissed, with leave to the United States to reinstate the same upon the failure of the company, in good faith, to observe the said conditions.

Subsequently, the railroad company resumed work on, and, during the year 1873, completed, Pier No. 1 adjacent to the river and east of the breakwater of 1869.

On the 15th of April, 1873, the legislature of Illinois passed the following act, which was in force from and after July 1, 1873:

“§ 1. *Be it enacted, etc.*, That the act entitled ‘An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan,

## Statement of the Case.

on the eastern frontage of the city of Chicago,' in force April 16, 1869, be and the same is hereby repealed." Ill. Laws of 1873, 115.

In 1880 and 1881 Piers Nos. 2 and 3, north of Randolph street, were constructed in conformity with plans submitted to and approved by the War Department.

The common council of Chicago, by ordinance approved July 12, 1881, extended Randolph street eastwardly, and declared it to be a public street, from its then eastern terminus "to the west line of the right of way of the Illinois Central Railroad Company, as established by the ordinance of September 10, 1855, . . . and also straight eastwardly . . . from the easterly line of Slip C, produced southerly to Lake Michigan;" giving permission to the company to construct and maintain at its own expense, within the line of Randolph street so extended and over the company's tracks and right of way, a bridge or viaduct, with suitable approaches, to be approved by the Commissioners of Public Works, which should be forever free to the public and to all persons having occasion to pass and repass thereon. Such a bridge or viaduct was necessary in order that the piers constructed and in process of construction east of the breakwater of 1869 might be conveniently reached by teams. The viaduct was built in 1881, and extends to the base of Pier 3. It has ever since been used by the public.

It appears from the evidence that in 1882, the pier, which was built in 1870 from Twelfth street to the north line, extended, of lot 21, was continued as far south as the centre line of Sixteenth street. The main object of this extension, according to the showing made by the company, was to protect the tracks from the waves during storms from the northeast. Another object was to construct a slip or basin south of the south line of lot 21, between the breakwater and the shore, where vessels loaded with materials for the company, or having freight to be handled, could enter and be in safety. In 1885, a pier was constructed by the company at the foot of Thirteenth street, according to a plan submitted to the War Department; and the department did not object to its construction, "provided



## Statement of the Case.

no change be made in its location and length." The pier, as constructed, does not differ from that proposed and approved, except that it is wider by fifty feet. But it does not appear that the War Department regards that change in the plan as injurious to navigation, or as interfering with the plans of the government for an outer harbor.

At the hearing in the court below, a map was used for the purpose of showing the different works constructed by the United States; the location of all the structures and buildings erected by the railroad company, with the date of their erection; and the relation of the tracks and breakwaters of the company to the shore as it now is, and, to some extent, as it was heretofore.

That map, known as the Morehouse map, and called C, is substantially reproduced on page 413.

The State, in the original suit, asks a decree establishing and confirming its title to the bed of Lake Michigan, and its sole and exclusive right to develop the harbor of Chicago, by the construction of docks, wharves, etc., as against the claim by the railroad company that it has an absolute title to said submerged lands, described in the act of 1869, and the right—subject to the paramount authority of the United States in respect to the regulation of commerce between the States—to fill the bed of the lake, for the purposes of its business, east of and adjoining the premises between the river and the north line of Randolph street, and also north of the south line of Lot 21; and, also, the right, by constructing and maintaining wharves, docks, piers, etc., to improve the shore of the lake, for the purposes of its business, and for the promotion, generally, of commerce and navigation. The State, insisting that the company has, without right, erected, and proposes to continue to erect, wharves, piers, etc., upon the domain of the State, asks that such unlawful structures be directed to be removed, and the company enjoined from constructing others.

The city, by its cross-bill, insists that since June 7, 1839, when the map of Fort Dearborn addition was recorded, it has had the control and use for public purposes of that part of section 10 which lies east of Michigan Avenue and between



Mr. Ayer's Argument for the Illinois Central Railroad Company.

Randolph street and fractional section fifteen ; and that, as successor of the town of Chicago, it has had possession and control since June 13, 1836, when the map of Fractional Section 15 Addition was recorded, of the lands in that Addition north of block 23. It asks a decree declaring that it is the owner in fee, and of the riparian rights thereunto appertaining, of all said lands, and has under existing legislation, the exclusive right to develop the harbor of Chicago by the construction of docks, wharves and levees, and to dispose of the same by lease or otherwise as authorized by law ; and that the railroad company be enjoined from interfering with its said rights and ownership.

The railroad company, the State and the city, each appealed from the final decree.

In the arguments, some points were taken and many cases cited thereto, which are not noticed or referred to in the opinion of the court *infra*.

*Mr. Benjamin F. Ayer* for the Illinois Central Railroad Company.

I. The railroad company is charged in the information with an invasion of the proprietary interest of the State in the bed of the lake. The encroachments complained of are upon the *jus privatum* or right of property asserted by the State, and not upon the *jus publicum* or governmental control over navigable waters vested in the State for public purposes. There is a broad distinction between a violation of the public right in navigable waters and an invasion of the proprietary interest of the sovereign. The one creates a public nuisance; the other a purpresture.

II. The complainants allege and the respondent admits, that upon the admission of Illinois into the Union in 1818 the title to the bed of Lake Michigan, or so much of it as lies within the boundaries of the State, became vested in the State.

Upon the separation of the British Colonies in America from the mother country, they succeeded as sovereign States to the title of the crown in the tide waters within their terri-

## Mr. Ayer's Argument for the Illinois Central Railroad Company.

torial limits. Both the *jus publicum* and the *jus privatum*, which before then had been vested in the crown and parliament, or in the local governments established under the royal sanction, became vested in the several States. They acquired not only the ownership of the soil under navigable waters, but also the legislative authority to regulate and control the rights of the public. All the prerogatives and powers which before belonged either to the crown or parliament, became immediately vested in the State. *Martin v. Waddell*, 16 Pet. 367; *Smith v. Maryland*, 18 How. 71; *Commonwealth v. Alger*, 7 Cush. 53; *Nichols v. Boston*, 98 Mass. 39; *S. C.* 93 Am. Dec. 132; *People v. New York & Staten Island Ferry Co.*, 68 N. Y. 71; *Langdon v. Mayor of New York*, 93 N. Y. 129; *Stevens v. Patterson and Newark Railroad*, 34 N. J. Law (5 Vroom) 532.

The foregoing cases relate to lands under tide waters; but the principles enunciated are equally applicable to navigable waters above the flow of the tide. *St. Clair County v. Lovings-ton*, 23 Wall. 46; *Barney v. Keokuk*, 94 U. S. 324; *Packer v. Bird*, 137 U. S. 661; *Hardin v. Jordan*, 140 U. S. 371.

III. The Illinois Central Railroad Company was authorized and required by its charter to lay out and construct a railroad into the city of Chicago. To aid in building the road, extensive grants of land were made by the State to the Company—among them, the following: “SEC. 3. The said corporation shall have right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding two hundred feet in width, through its entire length: may enter upon and take possession of and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, . . . station grounds, . . . turn-outs, engine-houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes.”



## Mr. Ayer's Argument for the Illinois Central Railroad Company.

The effect of these words is obviously to invest the company with a complete title to all the lands belonging to the State, which should be required and taken for the purposes mentioned. *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 680; *Van Ness v. Washington*, 4 Pet. 232, 284.

The right of the company to appropriate to its use the lands of the State, is coëxtensive with the power conferred by the same section of the charter to acquire by purchase or condemnation the lands of private owners. The latter is a continuing power which may be exercised from time to time as the necessities of the company may require. *Chicago and West. Indiana Railroad v. Illinois Central Railroad*, 113 Illinois, 156; *Chicago, Burlington &c. Railroad v. Wilson*, 17 Illinois, 123; *N. Y. & Harlem Railroad v. Kip*, 46 N. Y. 546.

IV. The consent of the common council of Chicago to the location of the railroad within the city, was required by the eighth section of the company's charter. An ordinance granting that consent was passed June 14, 1852, and a formal contract under seal was entered into between the railroad company and the city, in which it was covenanted that the ordinance should be of perpetual obligation, and that each party would abide by and perform all the obligations therein contained according to the true intent and meaning thereof. The assent was given on conditions which were extremely burdensome, but they have been fully complied with. The railroad was located and built in the open waters of the lake in front of fractional sections ten and fifteen, as directed by the common council; and the company had been in peaceable possession of the grounds appropriated for that purpose, with the exception of a strip one hundred feet in width on the east side of the railroad tracks, for thirty years before the commencement of this suit. The proof shows that the ordinance was accepted by the railroad company. The company did not immediately occupy all the land described; but the title to land is not lost by leaving it in its natural state without improvement. *Potomac Steamboat Co. v. Upper Potomac*



Mr. Ayer's Argument for the Illinois Central Railroad Company.

*Steamboat Co.*, 109 U. S. 672, 684; *Boston v. Lecraw*, 17 How. 426, 436; *Barclay v. Howell's Lessee*, 6 Pet. 498, 504, 505.

The company took possession of so much of the land as was then needed. When more became necessary for the proper conduct of its business, it attempted to take possession of the rest, and was prevented, not by the interference of the city — for the city did not object — but by the action of the War Department which has control of the harbor. That there was any election by the company to relinquish the right to the additional one hundred feet, or that the company is in any way estopped from claiming its rights against the city and State, is a conclusion, we respectfully submit, not warranted by any evidence in the record.

V. The railroad company's title to all the land it had reclaimed from the lake lying east of the west line of the railway in fractional sections ten and fifteen, was confirmed by the act of April 16, 1869. A confirmation by a law, is as fully to all intents and purposes a grant, as if it contained in terms a grant *de novo*. *Strother v. Lucas*, 12 Pet. 410; *Grignon's Lessee v. Astor*, 2 How. 319; *Ryan v. Carter*, 93 U. S. 78; *Morrow v. Whitney*, 95 U. S. 551.

VI. By the same act a further grant was made to the railroad company in the following terms: "All the right and title of the State of Illinois in and to the submerged land constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot 21, south of and near to the round-house and machine shops of said company in the south division of the city of Chicago, are hereby granted, in fee, to the Illinois Central Railroad Company, its successors and assigns."

It is manifest that the legislature intended to transfer, by this act, all the proprietary interest which the State had in the granted premises to the railroad company. The words used in the granting clause are words of present grant, and import an immediate transfer of title. There is no subsequent re-

## Mr. Ayer's Argument for the Illinois Central Railroad Company.

straining clause. The language admits, therefore, of no other interpretation. *Schulenberg v. Harriman*, 21 Wall. 44; *Leavenworth, Lawrence &c. Railroad v. United States*, 92 U. S. 733; *Railroad Company v. Baldwin*, 103 U. S. 426; *Wright v. Roseberry*, 121 U. S. 488; *Deseret Salt Co. v. Tarpey*, 142 U. S. 241. The title of the State became completely extinguished, and the entire estate in the land, subject only to the conditions annexed to the grant, became vested in the railroad company.

VII. The repeal of the act of April 16, 1869, did not divest the title which had become vested in the railroad company. Private rights which have vested under a legislative act are not affected by a repeal of the law, and cannot be annulled by subsequent legislation. A State does not possess the power of revoking its own grants.

It has been for more than eighty years the settled doctrine of this court, that a grant of land made by a State and accepted by the grantee is an executed contract, within the protection of that clause of the Constitution of the United States, which declares that no State shall pass any law impairing the obligation of contracts. *Fletcher v. Peck*, 6 Cranch, 87.

The right to acquire property, and to be secure in the enjoyment of it when lawfully acquired, has been placed beyond legislative encroachment everywhere in the United States. In some form of words, the constitution of every State contains a provision, that "no person shall be deprived of life, liberty or property, without due process of law"; and since the adoption of the Fourteenth Amendment in 1868, the same check on the abuse of legislative power has been provided by the Constitution of the United States. That railroad corporations are within the purview of this provision is settled by repeated decisions of this court. *Santa Clara County v. Southern Pacific Railroad*, 118 U. S. 394; *Minneapolis & St. Louis Railway v. Beckwith*, 129 U. S. 26; *Charlotte, Columbia &c. Railroad v. Gibbes*, 142 U. S. 386.

The act of April 16, 1869, was repealed on the 15th of April, 1873. During the intervening period of four years the

Mr. Miller's Argument for the City of Chicago.

title to the land in controversy was vested in the railroad company. The company still holds the title, unless it shall be held that the repealing act was "due process of law."

*Mr. John S. Miller* for the City of Chicago.

It is a matter of common knowledge that large expenditures have been made by the city of Chicago in the improvement of its harbor, the United States not having appropriated or spent any money for this harbor west of the Rush street bridge, which is near the mouth of the river, *Escanaba Co. v. Chicago*, 107 U. S. 678, and that the State of Illinois has never spent any money for that purpose.

The city has, in addition to its property interests upon the lake front, an interest and standing herein to protect and conserve this great harbor from encroachment and appropriation to private uses.

It is also the owner in fee, in trust for public uses, of the public grounds in section 10, south of the north line of Randolph street, upon the shore of the lake, and in section 15, known as Lake Park, and as such is entitled to the rights of riparian owner. The invasion of the shore upon this public ground south of Randolph street was the result of building the government piers at the mouth of the river. The natural effect of the waters, unaffected by these artificial causes, was to cause accretions along this front, but the current created by the construction of these piers and the turning off of the effect of storms, caused avulsion by which the shore was, not imperceptibly, but perceptibly and suddenly carried away.

This invasion of the water up to 1852, when the Illinois Central Railroad was constructed, had not changed the ownership. *Boston v. Leeraw*, 17 How. 426; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672. And this fact was recognized by the railroad company as well as by the city, in the ordinance of June 14, 1852, and the agreement made in pursuance thereof.

The city, being thus the owner of the shore, has all rights



## Mr. Miller's Argument for the City of Chicago.

of a riparian owner and its ownership includes any additions to the shore made by natural accretions or by art or industry. *Barclay v. Howell*, 6 Pet. 498; *New Orleans v. United States*, 10 Pet. 662, 717; *Barney v. Keokuk*, 94 U. S. 324; *Godfrey v. Alton*, 12 Illinois, 29; *S. C.* 52 Am. Dec. 476; *Chicago Dock & Canal Co. v. Kinzie*, 93 Illinois, 415.

The grant to the city of the power to establish wharves and slips was in aid of commerce and navigation, and was, by necessary implication, a grant of the lands upon which such wharves and slips might be established, such grant taking effect when structures of that kind were erected. *Williams v. Mayor*, 105 N. Y. 436. The same may be said of the grant of power to the city by the act of 1847, to build the break-water. Such riparian right is property right which is within constitutional protection. *Yates v. Milwaukee*, 10 Wall. 497; *Dutton v. Strong*, 1 Black, 23; *Railway Co. v. Renwick*, 102 U. S. 180; *Railroad v. Schurmeir*, 7 Wall. 272. And it would not be competent for the legislature to grant away the adjacent soil under the lake to a private person or corporation, and thus cut off the riparian right of the shore owner. This adjacency and access, and the right to maintain them to his advantage, and to preserve and improve them, and the enjoyment of the land, and of the navigable water in connection therewith, is of the essence of this riparian right. *Stevens v. Patterson & Newark Railroad*, 34 N. J. L. (5 Vroom,) 532; *Keyport Case*, 3 C. E. Green, (18 N. J. Eq.) 516; *Lyon v. Fishmongers' Co.*, 1 App. Cas. 662, 672; *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672, 683.

By the contract made by the railroad company with the city by the ordinance of June 14, 1852, and the agreement of March 28, 1853, the city and property owners acquired rights in furtherance of the special use to which this property was devoted, which could not be impaired. They got the break-water or barrier along the shore, fixing the shore line and protecting this trust property from encroachment. And the city, as riparian proprietor, had implied authority to erect wharves along the broad street, levee or public ground upon the shore, which was dedicated for the purpose of a landing-



Mr. Miller's Argument for the City of Chicago.

place as well as a street by authority of the State, and, it would seem, had, incidentally, the right to charge a compensation for their use. *Atlee v. Packet Co.*, 21 Wall. 389. It is clear that the legislature could not grant a way to the Illinois Central Railroad Company over the soils under the navigable waters of the harbor in front of this ground.

If the rights of the city and its inhabitants in this lake front ground and in the harbor in front thereof are not within the constitutional protection because they are public, how much more is that true of the subject-matter of the act of 1869? The subject-matter of that act, and of the alleged grant thereby made to the Illinois Central Railroad Company, was strictly *publici juris*. The bed of Lake Michigan, so far as the same is not affected with the rights of the riparian owner, is held by the people of the State of Illinois in their sovereign capacity, and *de communi jure*, and wholly in trust for the public, and for the public uses, for which it is adapted. And the same was not held by the State in any proprietary or private right or as its demesne, and was not as to a large tract, extending a mile into the deep water of the open lake, and composing the outer harbor, and entrance to the inner harbor of a great commercial city, the subject of a private grant or contract.

The doctrine which draws a distinction between a *jus privatum* and a *jus publicum*, or a dividing the ownership or right of the sovereign in the bed of navigable waters into a private right and a public right, which is alleged to have existed in the law of England, can have no place in our institutions. The rights of the people of the State in this country—their sovereignty and jurisdiction over the waters—are not governed by the common law of England as it prevailed in the colonies before the Revolution, but as modified by our own institutions. *Martin v. Waddell's Lessee*, 16 Pet. 367, 410; *Pollard's Lessee v. Hagan*, 3 How. 212, 229.

The ownership by the people of the State of the soils under navigable waters is, in its nature, entirely different from the title to the public lands or the demesne of the sovereign or State. That is not only shown by what is above said, and the

## Mr. Miller's Argument for the City of Chicago.

authorities quoted, but is emphasized by this court in *Pollard's Lessee v. Hagan*, 3 How. 212, and *Weber v. Harbor Commissioners*, 18 Wall. 57.

It must be clear, therefore, that in this country the right or ownership of the people of the State in the soils under navigable waters is wholly *jus publicum* and in trust for public uses.

And further, at the time of the passage of the act of 1869, no docks or wharves could be permitted to extend into the lake more than 1300 feet (where the line was established by the engineers of the United States in 1871,) without seriously encroaching upon the public right of navigation. This must be held to have been known at the time of the passage of that act. The United States government breakwater, which was built as an outside breakwater, to enclose and protect the harbor of refuge from the violence of the lake, is about three-fifths of a mile from the shore, and the dock line established by the United States engineers as the limit beyond which docks should not be built, between which and the shore there would be slips in which vessels could enter and ride, is about 1300 feet east of the shore. The water at this point is not within an arm of the lake ; there are not points or projections of land within which these waters were enclosed ; this entire one and four-fifths square miles of the bed of Lake Michigan was under the open, deep navigable waters of the lake. It was a public port, and as such free by the common law.

It does not help the case of the railroad company herein to say that the British Parliament might have made such a grant, and that the legislature of Illinois has in that respect, all the powers of parliament. Parliament never did make such a grant. And if parliament could make the grant under the English constitution, so by its same absolute power it could take it away. Parliament therefore could not make such an irrevocable grant as the railroad company here claims.

Neither did the act of April 16, 1869, constitute a contract between the State and the railroad company within the meaning and protection of section 10, article 1, of the Constitution of the United States, prohibiting the passage of laws impairing

## Mr. Gregory's Argument for the City of Chicago.

the obligations of contracts. It did not invest the company with such property rights in the soil and bed of the lake in the harbor of the city of Chicago, which is covered by the act, as is within the meaning and protection of the Fourteenth Amendment to the Constitution. The act, if sustainable as valid, can be sustained only because it invested the railroad company with certain strictly public powers and trusts as a public agency and for the public good. Being without consideration, it was a mere license, revocable at the will of the legislature, if it authorized the railroad company to make any private use of the bed of the lake. It was purely voluntary. It created no obligation on the part of the railroad company.

The charter of the railroad company and this act of 1869 are to be strictly construed against the railroad company, and to give nothing by an implication which is not necessary and unavoidable. Grants of the sovereign are to be construed strictly against the grantee; they are not to be understood as diminishing its rights beyond what is taken away by necessary and unavoidable construction. *The Rebeckah*, 1 C. Rob. 230, per Lord Stowell. *Monroe v. Commissioners*, 2 Black, 720; *Bridge Proprietors v. Hoboken Co.*, 1 Wall, 116; *Rice v. Railroad Co.*, 1 Black, 358.

It follows that the repealing act of April 15, 1873, was valid, as to the entire act of 1869. Moreover, if the act of 1869 could, upon a proper construction be held to give the railroad company any beneficial right, that right extinguishing or affecting the public right, arises from the exercise by the legislature of the police power over the public use of navigable waters, for the public welfare, and is revocable. And the repealing act is the exercise of the police power. *Commonwealth v. Alger*, 7 Cush. 53, 95. The soil under navigable waters being held by the people of the State, *de jure communi*, in trust for the common use, as a portion of their inherent sovereignty, any act of legislation affecting their use relates to the *jus publicum*, and affects the public welfare; and is, therefore, the exercise of the police power.

*Mr. S. S. Gregory* for the city of Chicago.



## Mr. Gregory's Argument for the City of Chicago.

By section 3 of the railroad company's charter, it was provided that the corporation should have the "right of way upon and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of, and use all and singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State, are hereby granted to said corporation for said purposes."

Having regard to the rules of construction which apply to the grant of corporate powers and privileges from the State, it cannot be successfully maintained that this provision in the charter would confer any right upon the corporation to invade the bed or waters of Lake Michigan, of its track in Lake Michigan or upon its bed. The section concludes with a proviso against any construction of the act which would warrant the company in interrupting the navigation of "said streams."

It is quite apparent, also, that this charter contemplated that the railroad company should take a right of way upon land not exceeding two hundred feet in width, and that the grant of land, waters, etc., belonging to the State to the corporation was for such purpose—namely, the right of way and use and control for the purpose of a railroad, as contemplated by the charter.

Between Randolph street and Park Row the railroad company has, therefore, merely a right of way under its charter.

Prior to this location, the territory being concededly within the corporate limits of the city of Chicago, the railroad company applied for and obtained the consent of its common council to the location of its road within the city limits, and entered into an agreement with that body, dated the 28th of March, 1853, accepting a location, three hundred feet in width, from the southern boundary of the public ground near Twelfth



Mr. Gregory's Argument for the City of Chicago.

street to the northern line of Randolph street." The company did not see fit to avail itself of a right of way to the full width of three hundred feet, but, on the contrary took a right of way of two hundred feet, and constructed its breakwater or shore protection two hundred feet east from the western line of its right of way instead of three hundred feet, as it might have done under the ordinance, though not under its charter, and it has since continued to use this right of way as thus limited and defined.

It is not, therefore, true that the railroad company was the owner of the fee of this right of way, as was argued in the court below, and may perhaps be argued in this court. It had merely an easement or right of way in this land, which neither conferred any riparian right upon the railroad, nor affected such right in the owner of the land over which the right of way extended. *Banks v. Ogden*, 2 Wall. 57. The riparian right was in the city.

It would seem obvious that a fair construction of the charter powers of the city would include a right to build wharves on the lake front, or the east side, if it may be so called, of Michigan Avenue. That seems to be the clear purport of the decision of this court in *Potomac Steamboat Co. v. Upper Potomac Steamboat Co.*, 109 U. S. 672. There was a legislative purpose to effectuate the dedication of this public grant as a water front or public landing place, authority to improve which was to be vested in the city, and full municipal control over which and the adjacent harbor was to be committed to the city.

If it be conceded that these rights in the city are held at the pleasure of the legislature, then it may be said, to that extent anticipating the course of the argument, that if the act of 1869 be construed as devolving similar rights and privileges upon the railroad company as another or substituted public agency, and thus withdrawing them from the city, the company should be considered to hold those rights upon the same tenure as that of the city, prior to this substitution; and the grant in fee of the bed of the lake is to be regarded wholly as in aid of the right to dock and wharf, expressing

## Mr. Gregory's Argument for the City of Chicago.

only what, by necessary implication, would have passed without formal grant.

It is not contended that these lot owners have strictly and technically riparian rights in the premises, but they are beneficiaries of the trust created by the dedication, and have a right to insist, as held by this court, upon its specific execution. *Barclay v. Howell's Lessee*, 6 Pet. 498. The rights of abutting lot owners to insist upon the appropriation of property dedicated to a specific public use in accordance with such dedication is fully recognized in the following cases: *Trustees v. Walsh*, 57 Illinois, 363, 369; *Maywood Co. v. Maywood*, 118 Illinois, 61, 72; *Jacksonville v. Jacksonville Railway*, 67 Illinois, 540; *Moose v. Carson*, 104 N. Car. 431; *Zinc Co. v. La Salle*, 117 Illinois, 411; *Cincinnati v. White's Lessee*, 6 Pet. 431; *Barney v. Keokuk*, 94 U. S. 324, 339, 340, 342.

The right of a State to hold the soil under its navigable waters for all municipal purposes is exclusive. If it holds title to such lands upon trusts for public use, it may be that it has power to release to an individual or a corporation such title as it has, not thereby emancipating the trust estate from the execution of the trust with which it stands charged, but substituting its grantee as the trustee of this trust. Such would be the effect of legislation authorizing any other public agency, as the city of Chicago, or perhaps the railroad company, to undertake the construction of wharves and docks in aid of navigation, and in execution of the public trust, subject to which title to the land under navigable waters rests in the State. But to say this is far from saying that the State as proprietor, or the legislature of a State by law in the exercise of plenary legislative power, such as is enjoyed by the parliament of England, may grant title to the bed of navigable waters. In so far as such grant is made in aid of navigation, as by way of granting flats which are an obstacle to navigation, or of shore privileges, the exercise of which is a positive aid to navigation, the State acts clearly within its duty as trustee for the great public trust attaching to its title.

As a proprietor in the sense in which it is the proprietor of lands, title to which rests in the State for the purpose of sale

## Mr. Gregory's Argument for the City of Chicago.

and disposition, it has no title whatever to the bed of water actually navigable and required for the purposes of navigation. Its interest, while referred to in the case cited as proprietary, is essentially sovereign and municipal. It is not the subject of grant but of regulation by law, and disposition by law is not unrestrained as is the case in England, but in so far as attempted in derogation of the trust for public navigation, is absolutely prohibited by the commerce clause of the Federal Constitution.

Probably the history of American jurisprudence will not reveal a case in which an attempt by the State to abdicate its sovereign title to the bed of a great extent of navigable water manifestly required for the purposes of commerce and navigation, has been either made by a legislature or sanctioned by the courts. Treated as a grant by a proprietor such legislation would be inoperative because the grantor has no such title as he attempts to convey. Treated as an exercise of sovereign legislative power it would be absolutely void as a positive infraction of the Federal Constitution. No such attempt was made in this case, and no reasonable construction of the legislative act under review will permit counsel justly to tax the legislature of Illinois with such a wanton abuse of power and gross breach of high and important public trust.

All the cases establish that although the State may have in a sense a measure of proprietary right in the bed of navigable waters within its boundaries, that right pertains to sovereignty, and a grant thereof confers no such dominion or ownership upon the grantee as a grant of public lands of the State subject to disposition. Such right is also qualified by the riparian rights of shore owners which do not at all depend upon ownership of the bed of the water. Such riparian right is a valuable property right which cannot be taken or impaired by the State without compensation. This principle is firmly established in this country by the adjudications of this court and by the great weight of modern authority. *Dutton v. Strong*, 1 Black, 213; *Railroad Co. v. Schurmeir*, 7 Wall. 272; *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harbor Commissioners*,



## Mr. Gregory's Argument for the City of Chicago.

18 Wall. 57; *St. Louis v. Rutz*, 138 U. S. 236; *Union Depot Co. v. Brunswick*, 31 Minnesota, 297; *Miller v. Mendenhall*, 43 Minnesota, 95; *Burton v. Richardson*, 105 Mass. 351; *Rumsey v. New York & New England Railroad*, 133 N. Y. 79.

The grant by the State to the railroad company was wholly gratuitous. When, in the exercise of legislative discretion, it appeared that those public purposes, regard for which suggested the gift of these powers to the railroad company, might be better served by their withdrawal, it was clearly competent for the legislature, having due regard for such property rights as had attached to the subject of their gift in the interval, to resume the subject of its license and to permit the city to control these essentially public and municipal franchises.

Neither the provisions of the Fourteenth Amendment, nor that clause in the Federal Constitution which forbids a State from passing a law to impair the obligation of contracts in anywise affect this exercise of legislative discretion.

The State did not attempt to convey the fee to the bed of the lake, in derogation of the public right of navigation. Its sovereign or legislative right to convey the bed of water actually navigable is clearly limited by the clause in the Constitution conferring upon Congress the power to regulate commerce. Subject to this clause its plenary power to grant the bed of the lake, adjacent to the shore, in aid of commerce and navigation must be conceded, subject also, however, to the right of the State, by subsequent legislation, to regulate and control the use to which property so bestowed might be put by the grantee.

The constitutional questions involved in this case arise on a consideration of the validity and effect of the repealing act of April 15, 1873. The company had no property rights under the act of 1869, except in so far as it acted thereunder and filled in the waters of Lake Michigan, and built wharves and other erections thereon in accordance with the permission therein contained. To the extent that its property rights actually attached, it was fully protected by the decree of the



Mr. Hunt's Argument for the State.

Circuit Court. *Attorney General v. Boston & Lowell Railroad*, 118 Mass. 345.

*Mr. George Hunt*, Attorney General of the State, for the State of Illinois.

I. The lake front act was never passed by the legislature.

II. The subject of that act was not expressed in its title.

III. The railroad company had no power to hold the submerged lands. *Ill. Cent. Railroad v. The People*, 119 Illinois, 137; *In re Swigert*, 119 Illinois, 83.

IV. The constitution of 1870 repealed all existing charters or grants of special privileges to corporations, which were not accepted within ten days after the new constitution took effect.

V. There was no acceptance of any additional corporate powers under the lake front act within the time limited by the constitution.

VI. Under the constitution of 1848 it was not competent for the General Assembly to grant to the Illinois Central Company the title to the land in question by a mere legislative act, without the approval of the governor.

VII. No right was conferred upon the railroad company by its charter to use the harbor for railroad purposes. *St. Louis &c. Railroad v. Trustees*, 43 Illinois, 303.

VIII. The act of 1869 by its confirmatory clause conferred no new right. *Illinois Central Railroad v. Irwin*, 72 Illinois, 452.

IX. The right to construct wharves and piers in the navigable waters of a public harbor does not pass with a grant of the submerged land. The authority and duty of the city to develop the harbor by the extension of streets and piers has not therefore been taken away, nor has it been deprived of its riparian rights as owner of the public ground in front of the harbor. *People v. Ferry Co.*, 68 N. Y. 71; *Langdon v. New York City*, 93 N. Y. 144.

X. The right to wharf and construct piers in the harbor not passing with the grant of the submerged land, does not arise

Mr. Jewett's Argument for the Illinois Central Railroad Company.

by implication from the words of the proviso, and that implication is not of sufficient force to deprive the city of its power to extend streets as piers, and to take away the riparian rights of the shore owners. *Perrine v. Chesapeake & Delaware Canal*, 9 How. 172.

XI. The right to wharf in the harbor, even if given by the act of 1869, was revocable, and was recalled by the repealing act of 1873.

XII. The State of Illinois did not possess the power to grant these submerged lands, underlying the harbor of a great city, to a railroad corporation. *Martin v. Waddell*, 16 Pet. 367.

XIII. Whatever wharfing rights and franchises may have passed by the act of 1869 were recalled by its repeal, because they were supplementary, and not original privileges, and such grants and privileges create no contract protected by the Federal Constitution. *Salt Company v. East Saginaw*, 13 Wall. 373.

*Mr. John N. Jewett* closed, for the Illinois Central Railroad Company.

I. The common law doctrine in respect to the ownership, control and right of disposition of land under tide waters prevails in this country and is, by repeated decisions of this court, made applicable to the bodies of fresh water, denominated "Great Navigable Lakes," which are treated as "Inland Seas." The rule in respect of all such bodies of water is, that the title and right of disposition of the land under the waters within their respective jurisdictions, are vested in the several States by virtue of their sovereignty as such States. *Manchester v. Massachusetts*, 139 U. S. 240; *Smith v. Maryland*, 18 How. 71; *McCready v. Virginia*, 94 U. S. 391; *Martin v. Waddell*, 16 Pet. 367; *Hardin v. Jordan*, 140 U. S. 371; *Goodtitle v. Kibbe*, 9 How. 471; *Doe v. Beebe*, 13 How. 25; *Pollard's Lessee v. Hagan*, 3 How. 212; *Mumford v. Wardwell*, 6 Wall. 423; *Weber v. Harbor Commissioners*, 18 Wall. 57; *St. Clair County v. Lovington*, 23 Wall. 68; *Barney v. Keokuk*, 94 U. S. 324; *The Genessee Chief*, 12 How. 443.

II. The riparian owner, in the absence of restrictive legis-

Mr. Jewett's Argument for the Illinois Central Railroad Company.

lation, has the right to connect his shore line, by means of wharves, piers or docks, constructed in the shallow waters immediately bordering upon his land, with the waters which are navigable in fact, in his own interest as well as in the interest of the public. *Yates v. Milwaukee*, 10 Wall. 497; *Weber v. Harbor Commissioners*, 18 Wall. 57; *Dutton v. Strong*, 1 Black, 23; *Railroad Company v. Schurmeir*, 7 Wall. 272.

III. The making and recording of the maps and plats of the "Fort Dearborn Addition to Chicago," by authority of the United States, and the sale and conveyance of all the lots designated upon that map or plat, divested the United States of all jurisdiction and authority over the land so subdivided and sold, and of the incidents of ownership pertaining to the lands. The sovereignty and jurisdiction thereby passed to the State of Illinois, the ownership of the lots conveyed, to the purchasers, and the title to the streets, alleys and public grounds designated on the plat, to the municipal corporation of Chicago, in trust for the use of the public. Every act of the city within these powers absolutely accomplished, the State should respect. Every power of agency, unexecuted, is subject to revocation, either expressly or by implication. *East Hartford v. Hartford Bridge Co.*, 10 How. 511; *Van Hoffman v. Quincy*, 4 Wall. 535.

IV. The making and recording of the plats of fractional section 15 addition to Chicago, and of Fort Dearborn addition to Chicago, and the sale of all the lots in those additions, in accordance with those plats, divested the former owners, although they were the State in one case, and the United States in the other case, of all their right, title and estate as individual proprietors in said additions, including the streets and public grounds; and the sovereignty and jurisdiction of the United States over the land comprising Fort Dearborn addition, was by the plat and the record of it and the sale of the lots, absolutely extinguished. In the making and recording of sheet plats, the State and the United States were acting as private owners, and subject to the law to the same extent that a citizen would be. *New Orleans v. United States*, 10 Pet. 662, 710.

## Mr. Jewett's Argument for the Illinois Central Railroad Company.

V. The act of the general assembly of April 16, 1869, entitled "An act in relation to a portion of the submerged lands and Lake Park grounds, lying on and adjacent to the shore of Lake Michigan on the eastern frontage of the city of Chicago" and commonly known as "the Lake Front act," was a valid act of legislation, passed in a constitutional way. Due effect must therefore be given to it as such. To this extent the opinion of Mr. Justice Harlan, and the decree entered by his direction in this case, support the contention of the Illinois Central Railroad Company. See also *Schuyler County v. The People*, 25 Illinois, 181; *Wabash Railway v. Hughes*, 38 Illinois, 174.

VI. The Illinois Central Railroad Company was in no need of "the Lake Front Act" as a confirmatory act. Its rights, so far as covered by the act, as a confirmatory one, were fully protected by its original charter. The confirmation was a recognition of its existing rights. A grant, originally complete, is not made stronger by a subsequent confirmation. Still, accepting the act of confirmation, with all its consequences, it is respectfully insisted that confirmation of existing rights was not the chief purpose of the act itself. This may be safely assumed from its positive provisions.

VII. The Lake Front act, coupled with the acceptance of it, made a completed grant, in accordance with its terms, taking effect *in presenti*. No further act on the part of the State was required, nor was it necessary to perfect the grant. *Rutherford v. Greene*, 2 Wheat. 196; *Harris v. Board of Supervisors*, 105 Illinois, 445; *Lavalle v. Strobel*, 89 Illinois, 370.

VIII. The Act of the General Assembly of the State of Illinois, of April 15, 1873, purporting to repeal "The Lake Front act" of April 16, 1869, was absolutely void, and did not and could not operate to divest the title and rights of the Illinois Central Railroad Company, granted to it by the earlier act, the provisions of which it had formally accepted and acted upon. *Fletcher v. Peck*, 6 Cranch, 87; *New Jersey v. Wilson*, 7 Cranch, 164; *Von Hoffman v. Quincy*, 4 Wall. 535.



## Opinion of the Court.

MR. JUSTICE FIELD delivered the opinion of the court.

This suit was commenced on the 1st of March, 1883, in a Circuit Court of Illinois, by an information or bill in equity, filed by the Attorney General of the State, in the name of its people against the Illinois Central Railroad Company, a corporation created under its laws, and against the city of Chicago. The United States were also named as a party defendant, but they never appeared in the suit, and it was impossible to bring them in as a party without their consent. The alleged grievances arose solely from the acts and claims of the railroad company, but the city of Chicago was made a defendant because of its interest in the subject of the litigation. The railroad company filed its answer in the state court at the first term after the commencement of the suit, and upon its petition the case was removed to the Circuit Court of the United States for the Northern District of Illinois. In May following the city appeared to the suit and filed its answer, admitting all the allegations of fact in the bill. A subsequent motion by the complainant to remand the case to the state court was denied. 16 Fed. Rep. 881. The pleadings were afterwards altered in various particulars. An amended information or bill was filed by the Attorney General, and the city filed a cross-bill for affirmative relief against the State and the company. The latter appeared to the cross-bill and answered it, as did the Attorney General for the State. Each party has prosecuted a separate appeal.

The object of the suit is to obtain a judicial determination of the title of certain lands on the east or lake front of the city of Chicago, situated between the Chicago River and Sixteenth street, which have been reclaimed from the waters of the lake, and are occupied by the tracks, depots, warehouses, piers and other structures used by the railroad company in its business; and also of the title claimed by the company to the submerged lands, constituting the bed of the lake, lying east of its tracks, within the corporate limits of the city, for the distance of a mile, and between the south line of the south pier near Chicago River extended eastwardly, and a line

## Opinion of the Court.

extended, in the same direction, from the south line of lot 21 near the company's round-house and machine shops. The determination of the title of the company will involve a consideration of its right to construct, for its own business, as well as for public convenience, wharves, piers and docks in the harbor.

We agree with the court below that, to a clear understanding of the numerous questions presented in this case, it was necessary to trace the history of the title to the several parcels of land claimed by the company. And the court, in its elaborate opinion, (33 Fed. Rep. 730,) for that purpose referred to the legislation of the United States and of the State, and to ordinances of the city and proceedings thereunder, and stated, with great minuteness of detail, every material provision of law and every step taken. We have with great care gone over the history detailed and are satisfied with its entire accuracy. It would, therefore, serve no useful purpose to repeat what is, in our opinion, clearly and fully narrated. In what we may say of the rights of the railroad company, of the State, and of the city, remaining after the legislation and proceedings taken, we shall assume the correctness of that history.

The State of Illinois was admitted into the Union in 1818 on an equal footing with the original States in all respects. Such was one of the conditions of the cession from Virginia of the territory northwest of the Ohio River, out of which the State was formed. But the equality prescribed would have existed if it had not been thus stipulated. There can be no distinction between the several States of the Union in the character of the jurisdiction, sovereignty and dominion which they may possess and exercise over persons and subjects within their respective limits. The boundaries of the State were prescribed by Congress and accepted by the State in its original Constitution. They are given in the bill. It is sufficient for our purpose to observe that they include within their eastern line all that portion of Lake Michigan lying east of the main land of the State and the middle of the lake south of latitude forty-two degrees and thirty minutes.

## Opinion of the Court.

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several States, belong to the respective States within which they are found, with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters, and subject always to the paramount right of Congress to control their navigation so far as may be necessary for the regulation of commerce with foreign nations and among the States. This doctrine has been often announced by this court, and is not questioned by counsel of any of the parties. *Pollard's Lessee v. Hagan*, 3 How. 212; *Weber v. Harbor Commissioners*, 18 Wall. 57.

The same doctrine is in this country held to be applicable to lands covered by fresh water in the Great Lakes over which is conducted an extended commerce with different States and foreign nations. These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide. In other respects they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes. At one time the existence of tide waters was deemed essential in determining the admiralty jurisdiction of courts in England. That doctrine is now repudiated in this country as wholly inapplicable to our condition. In England the ebb and flow of the tide constitute the legal test of the navigability of waters. There no waters are navigable in fact, at least to any great extent, which are not subject to the tide. There, as said in the case of *The Genesee Chief*, 12 How. 443, 455, "tide water and navigable water are synonymous terms, and tide water, with a few small and unimportant exceptions, meant nothing more than public rivers, as contradistinguished from private ones;" and writers on the subject of admiralty jurisdiction "took the ebb and flow of the tide as the test because it was a convenient one, and more easily determined



## Opinion of the Court.

the character of the river. Hence the established doctrine in England, that the admiralty jurisdiction is confined to the ebb and flow of the tide. In other words, it is confined to public navigable waters."

But in this country the case is different. Some of our rivers are navigable for great distances above the flow of the tide; indeed, for hundreds of miles, by the largest vessels used in commerce. As said in the case cited: "There is certainly nothing in the ebb and flow of the tide that makes the waters peculiarly suitable for admiralty jurisdiction, nor anything in the absence of a tide that renders it unfit. If it is a public navigable water, on which commerce is carried on between different States or nations, the reason for the jurisdiction is precisely the same. And if a distinction is made on that account, it is merely arbitrary, without any foundation in reason; and, indeed, would seem to be inconsistent with it."

The Great Lakes are not in any appreciable respect affected by the tide, and yet on their waters, as said above, a large commerce is carried on, exceeding in many instances the entire commerce of States on the borders of the sea. When the reason of the limitation of admiralty jurisdiction in England was found inapplicable to the condition of navigable waters in this country, the limitation and all its incidents were discarded. So also, by the common law, the doctrine of the dominion over and ownership by the crown of lands within the realm under tide waters is not founded upon the existence of the tide over the lands, but upon the fact that the waters are navigable, tide waters and navigable waters, as already said, being used as synonymous terms in England. The public being interested in the use of such waters, the possession by private individuals of lands under them could not be permitted except by license of the crown, which could alone exercise such dominion over the waters as would insure freedom in their use so far as consistent with the public interest. The doctrine is founded upon the necessity of preserving to the public the use of navigable waters from private interruption and encroachment, a reason as applicable to navigable fresh waters as to waters moved by the tide. We hold, there-



## Opinion of the Court.

fore, that the same doctrine as to the dominion and sovereignty over and ownership of lands under the navigable waters of the Great Lakes applies, which obtains at the common law as to the dominion and sovereignty over and ownership of lands under tide waters on the borders of the sea, and that the lands are held by the same right in the one case as in the other, and subject to the same trusts and limitations. Upon that theory we shall examine how far such dominion, sovereignty and proprietary right have been encroached upon by the railroad company, and how far that company had, at the time, the assent of the State to such encroachment, and also the validity of the claim which the company asserts of a right to make further encroachments thereon by virtue of a grant from the State in April, 1869.

The city of Chicago is situated upon the southwestern shore of Lake Michigan, and includes, with other territory, fractional sections 10 and 15, in township 39 north, range 14 east of the third principal meridian, bordering on the lake, which forms their eastern boundary. For a long time after the organization of the city its harbor was the Chicago River, a small, narrow stream opening into the lake near the centre of the east and west line of section 10, and in it the shipping arriving from other ports of the lake and navigable waters was moored or anchored, and along it were docks and wharves. The growth of the city in subsequent years in population, business and commerce required a larger and more convenient harbor, and the United States, in view of such expansion and growth, commenced the construction of a system of breakwaters and other harbor protections in the waters of the lake in front of the fractional sections mentioned. In the prosecution of this work there was constructed a line of breakwaters or cribs of wood and stone covering the front of the city between the Chicago River and Twelfth street, with openings in the piers or lines of cribs for the entrance and departure of vessels, thus enclosing a large part of the lake for the uses of shipping and commerce, and creating an outer harbor for Chicago. It comprises a space about one mile and one-half in length from north to south, and

## Opinion of the Court.

is of a width from east to west varying from one thousand to four thousand feet. As commerce and shipping expand, the harbor will be further extended towards the south, and, as alleged by the amended bill, it is expected that the necessities of commerce will soon require its enlargement so as to include a great part of the entire lake front of the city. It is stated, and not denied, that the authorities of the United States have in a general way indicated a plan for the improvement and use of the harbor which has been enclosed as mentioned, by which a portion is devoted as a harbor of refuge where ships may ride at anchor with security and within protecting walls, and another portion of such enclosure nearer the shore of the lake may be devoted to wharves and piers, alongside of which ships may load and unload and upon which warehouses may be constructed and other structures erected for the convenience of lake commerce.

The case proceeds upon the theory and allegation that the defendant, the Illinois Central Railroad Company, has, without lawful authority, encroached, and continues to encroach, upon the domain of the State, and its original ownership and control of the waters of the harbor and of the lands thereunder, upon a claim of rights acquired under a grant from the State and ordinance of the city to enter the city and appropriate land and water two hundred feet wide in order to construct a track for a railway, and to erect thereon warehouses, piers and other structures in front of the city, and upon a claim of riparian rights acquired by virtue of ownership of lands originally bordering on the lake in front of the city. It also proceeds against the claim asserted by the railroad company of a grant by the State, in 1869, of its right and title to the submerged lands, constituting the bed of Lake Michigan lying east of the tracks and breakwater of the company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended in the same direction from the south line of lot twenty-one south of and near the machine shops and round-house of the company; and of a right thereby to construct at its pleasure, in the harbor, wharves, piers and other works for its use.

## Opinion of the Court.

The State prays a decree establishing and confirming its title to the bed of Lake Michigan and exclusive right to develop and improve the harbor of Chicago by the construction of docks, wharves, piers and other improvements, against the claim of the railroad company, that it has an absolute title to such submerged lands by the act of 1869, and the right, subject only to the paramount authority of the United States in the regulation of commerce, to fill all the bed of the lake within the limits above stated, for the purpose of its business; and the right, by the construction and maintenance of wharves, docks and piers, to improve the shore of the lake for the promotion generally of commerce and navigation. And the State, insisting that the company has, without right, erected and proposes to continue to erect wharves and piers upon its domain, asks that such alleged unlawful structures may be ordered to be removed, and the company be enjoined from erecting further structures of any kind.

And first, as to lands in the harbor of Chicago possessed and used by the railroad company under the act of Congress of September 20, 1850, (9 Stat. 466, c. 61,) and the ordinance of the city of June 14, 1852. By that act Congress granted to the State of Illinois a right of way, not exceeding one hundred feet in width, on each side of its length, through the public lands, for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal to a point at or near the junction of the Ohio and Mississippi Rivers, with a branch to Chicago and another *via* the town of Galena to a point opposite Dubuque in the State of Iowa, with the right to take the necessary materials for its construction. And, to aid in the construction of the railroad and branches, by the same act it granted to the State six alternate sections of land, designated by even numbers, on each side of the road and branches, with the usual reservation of any portion found to be sold by the United States, or to which the right of pre-emption had attached at the time the route of the road and branches was definitely fixed, in which case provision was made for the selection of equivalent lands in contiguous sections.



## Opinion of the Court.

The lands granted were made subject to the disposition of the legislature of the State; and it was declared that the railroad and its branches should be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of their property or troops.

The act was formally accepted by the legislature of the State, February 17, 1851, (Laws of 1851, 192, 193.) A few days before, and on the 10th of that month, the Illinois Central Railroad Company was incorporated. It was invested generally with the powers, privileges, immunities and franchises of corporations, and specifically with the power of acquiring by purchase or otherwise, and of holding and conveying real and personal estate which might be needful to carry into effect fully the purposes of the act.

It was also authorized to survey, locate, construct and operate a railroad, with one or more tracks or lines of rails, between the points designated and the branches mentioned. And it was declared that the company should have a right of way upon, and might appropriate to its sole use and control, for the purposes contemplated, land not exceeding two hundred feet in width throughout its entire length; and might enter upon and take possession of and use any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, engine-houses, shops and other buildings necessary for completing, maintaining and operating the road. All such lands, waters, materials and privileges belonging to the State were granted to the corporation for that purpose; and it was provided that, when owned by or belonging to any person, company or corporation, and they could not be obtained by voluntary grant or release, the same might be taken and paid for by proceedings for condemnation as prescribed by law.

It was also enacted that nothing in the act should authorize the corporation to make a location of its road within any city without the consent of its common council. This consent was given by an ordinance of the common council of Chicago,



## Opinion of the Court.

adopted June 14, 1852. By its first section it granted permission to the company to lay down, construct and maintain within the limits of the city, and along the margin of the lake within and adjacent to the same, a railroad, with one or more tracks, and to operate the same with locomotive engines and cars, under such rules and regulations with reference to speed of trains, the receipt, safe-keeping and delivery of freight, and arrangements for the accommodation and conveyance of passengers, not inconsistent with the public safety, as the company might from time to time establish, and to have the right of way and all powers incident to and necessary therefor in the manner and upon the following terms and conditions, namely, that the road should enter the city at or near the intersection of its then southern boundary with Lake Michigan, and follow the shore on or near the margin of the lake northerly to the southern bounds of the open space known as Lake Park, in front of canal section fifteen, and continue northerly across the open space in front of that section to such grounds as the company might acquire between the north line of Randolph street and the Chicago River, in the Fort Dearborn addition, upon which grounds should be located the depot of the railroad company within the city, and such other buildings, slips or apparatus as might be necessary and convenient for its business. But it was understood that the city did not undertake to obtain for the company any right of way, or other right, privilege or easement, not then in its power to grant, or to assume any liability or responsibility for the acts of the company. It also declared that the company might enter upon and use in perpetuity for its line of road and other works necessary to protect the same from the lake, a width of three hundred feet from the southern boundary of the public ground near Twelfth street, to the northern line of Randolph street; the inner or west line of the ground to be not less than four hundred feet east from the west line of Michigan Avenue, and parallel thereto; and it was authorized to extend its works and fill out into the lake to a point in the southern pier not less than four hundred feet west from the then east end of the same, thence parallel with Michigan

## Opinion of the Court.

Avenue to the north side of Randolph street, extended; but it was stated that the common council did not grant any right or privilege beyond the limits above specified, nor beyond the line that might be actually occupied by the works of the company.

By the ordinance the company was required to erect and maintain on the western or inner line of the ground pointed out for its main tracks on the lake shore such suitable walls, fences or other sufficient works as would prevent animals from straying upon or obstructing its tracks, and secure persons and property from danger; and to construct such suitable gates at proper places at the ends of the streets, which were then or might thereafter be laid out, as required by the common council, to afford safe access to the lake; and provided that, in the case of the construction of an outside harbor, streets might be laid out to approach the same in the manner provided by law. The company was also required to erect and complete within three years after it should have accepted the ordinance, and forever thereafter maintain, a continuous wall or structure of stone masonry, pier-work or other sufficient material, of regular and sightly appearance, and not to exceed in height the general level of Michigan Avenue, opposite thereto, from the north side of Randolph street to the southern bound of Lake Park, at a distance of not more than three hundred feet east from and parallel with the western or inner line of the company, and continue the works to the southern boundary of the city, at such distance outside of the track of the road as might be expedient; which structure and works should be of sufficient strength and magnitude to protect the entire front of the city, between the north line of Randolph street and its southern boundary, from further damage or injury from the action of the waters of Lake Michigan; and that that part of the structure south of Lake Park should be commenced and prosecuted with reasonable despatch after acceptance of the ordinance. It was also enacted that the company should "not in any manner, nor for any purpose whatever, occupy, use or intrude upon the open ground known as 'Lake Park,' belonging to the city of Chicago, lying between Michigan Avenue and the western or inner line before mentioned, except so far

## Opinion of the Court.

as the common council may consent, for the convenience of said company, while constructing or repairing the works in front of said ground." And it was declared that the company should "erect no buildings between the north line of Randolph street and the south side of the said Lake Park, nor occupy nor use the works proposed to be constructed between these points, except for the passage of or for making up or distributing their trains, nor place upon any part of their works between said points any obstruction to the view of the lake from the shore, nor suffer their locomotives, cars or other articles to remain upon their tracks, but only erect such works as are proper for the construction of their necessary tracks and protection of the same."

The company was allowed ninety days to accept this ordinance, and it was provided that upon such acceptance a contract embodying its provisions should be executed and delivered between the city and the company, and that the rights and privileges conferred upon the company should depend upon the performance on its part of the requirements made. The ordinance was accepted and the required agreement drawn and executed on the 28th of March, 1853.

Under the authority of this ordinance the railroad company located its tracks within the corporate limits of the city. Those running northward from Twelfth street were laid upon piling in the waters of the lake. The shore line of the lake was, at that time, at Park Row, about four hundred feet from the west line of Michigan Avenue, and at Randolph street about one hundred and twelve and a half feet. Since then the space between the shore line and the tracks of the railroad company has been filled with earth under the direction of the city and is now solid ground.

After the tracks were constructed the company erected a breakwater east of its roadway upon a line parallel with the west line of Michigan Avenue, and afterwards filled up the space between the breakwater and its tracks with earth and stone.

We do not deem it material, for the determination of any questions presented in this case, to describe in detail the extensive works of the railroad company under the permission given



## Opinion of the Court.

to locate its road within the city by the ordinance. It is sufficient to say that when this suit was commenced it had reclaimed from the waters of the lake a tract, two hundred feet in width, for the whole distance allowed for its entry within the city, and constructed thereon the tracks needed for its railway, with all the guards against danger in its approach and crossings as specified in the ordinance, and erected the designated break-water beyond its tracks on the east, and the necessary works for the protection of the shore on the west. Its works in no respect interfered with any useful freedom in the use of the waters of the lake for commerce, foreign, interstate or domestic. They were constructed under the authority of the law by the requirement of the city as a condition of its consent that the company might locate its road within its limits, and cannot be regarded as such an encroachment upon the domain of the State as to require the interposition of the court for their removal or for any restraint in their use.

The railroad company never acquired by the reclamation from the waters of the lake of the land upon which its tracks are laid, or by the construction of the road and works connected therewith, an absolute fee in the tract reclaimed, with a consequent right to dispose of the same to other parties, or to use it for any other purpose than the one designated — the construction and operation of a railroad thereon with one or more tracks and works in connection with the road or in aid thereof. The act incorporating the company only granted to it a right of way over the public lands for its use and control, for the purpose contemplated, which was to enable it to survey, locate, and construct and operate a railroad. All lands, waters, materials and privileges belonging to the State were granted solely for that purpose. It did not contemplate, much less authorize, any diversion of the property to any other purpose. The use of it was restricted to the purpose expressed. Whilst the grant to it included waters of streams in the line of the right of way belonging to the State, it was accompanied with a declaration that it should not be so construed as to authorize the corporation to interrupt the navigation of the streams. If the waters of the lake may be deemed to be included in the



## Opinion of the Court.

designation of streams, then their use would be held equally restricted. The prohibition upon the company to make a location of its road within any city, without the consent of its common council, necessarily empowered that body to prescribe the conditions of the entry so far at least as to designate the place where it should be made, the character of the tracks to be laid, and the protection and guards that should be constructed to insure their safety. Nor did the railroad company acquire by the mere construction of its road and other works any rights as a riparian owner to reclaim still further lands from the waters of the lake for its use, or the construction of piers, docks and wharves in the furtherance of its business. The extent to which it could reclaim the land under the waters was limited by the conditions of the ordinance, which was simply for the construction of a railroad on a tract not to exceed a specified width, and of works connected therewith.

We shall hereafter consider what rights the company acquired as a riparian owner from its acquisition of title to lands on the shore of the lake, but at present we are speaking only of what rights it acquired from the reclamation of the tract upon which the railroad and the works in connection with it are built. The construction of a pier or the extension of any land into navigable waters for a railroad or other purposes, by one not the owner of lands on the shore, does not give the builder of such pier or extension, whether an individual or corporation, any riparian rights. Those rights are incident to riparian ownership. They exist with such ownership and pass with the transfer of the land. And the land must not only be contiguous to the water, but in contact with it. Proximity without contact is insufficient. The riparian right attaches to land on the border of navigable water without any declaration to that effect from the former owner, and its designation in a conveyance by him would be surplusage. (See *Gould on Waters*, § 148, and authorities there cited.)

The riparian proprietor is entitled, among other rights, as held in *Yates v. Milwaukee*, 10 Wall. 497, 504, to access to the navigable part of the water on the front of which lies his land, and for that purpose to make a landing, wharf or pier for his

## Opinion of the Court.

own use or for the use of the public, subject to such general rules and regulations as the legislature may prescribe for the protection of the rights of the public. In the case cited the court held that this riparian right was property and valuable; and though it must be enjoyed in due subjection to the rights of the public, it could not be arbitrarily or capriciously impaired. It had been held in the previous case of *Dutton v. Strong*, 1 Black, 23, 33, that whenever the water of the shore was too shoal to be navigable, there was the same necessity for wharves, piers and landing places as in the bays and arms of the sea; that where that necessity existed, it was difficult to see any reason for denying to the adjacent owner the right to supply it; but that the right must be understood as terminating at the point of navigability, where the necessity for such erections ordinarily ceased.

In this case it appears that fractional section 10, which was included within the city limits bordering on the lake front, was, many years before this suit was brought, divided, under the authority of the United States, into blocks and lots, and the lots sold. The proceedings taken and the laws passed on the subject for the sale of the lots are stated with great particularity in the opinion of the court below, but for our purpose it is sufficient to mention that the lots laid out in fractional section 10 belonging to the United States were sold, and, either directly or from purchasers, the title to some of them fronting on the lake north of Randolph street became vested in the railroad company, and the company, finding the lake in front of those lots shallow, filled it in and upon the reclaimed land constructed slips, wharves and piers, the last three piers in 1872, 1873, 1880, and 1881, which it claims to own and to have the right to use in its business.

According to the law of riparian ownership, which we have stated, this claim is well founded so far as the piers do not extend beyond the point of navigability in the waters of the lake. We are not fully satisfied that such is the case from the evidence which the company has produced, and the fact is not conceded. Nor does the court below find that such navigable point had been established by any public authority

## Opinion of the Court.

or judicial decision, or that it had any foundation other than the judgment of the railroad company.

The same position may be taken as to the claim of the company to the pier and docks erected in front of Michigan Avenue between the lines of Twelfth and Sixteenth streets extended. The company had previously acquired the title to certain lots fronting on the lake at that point, and, upon its claim of riparian rights from that ownership, had erected the structures in question. Its ownership of them likewise depends upon the question whether they are extended beyond or are limited to the navigable point of the waters of the lake, of which no satisfactory evidence was offered.

Upon the land reclaimed by the railroad company as riparian proprietor in front of lots into which section ten was divided, which it had purchased, its passenger depot was erected north of Randolph street, and, to facilitate its approach, the common council, by ordinance adopted September 10, 1855, authorized it to curve its tracks westwardly of the line fixed by the ordinance of 1852, so as to cross that line at a point not more than two hundred feet south of Randolph street, in accordance with a specified plan. This permission was given upon the condition that the company should lay out upon its own land west of and alongside its passenger house a street fifty feet wide, extending from Water street to Randolph street, and fill the same up its entire length, within two years from the passage of the ordinance. The company's tracks were curved as permitted, the street referred to was opened, the required filling was done, and the street has ever since been used by the public. It being necessary that the railroad company should have additional means of approaching and using its station grounds between Randolph street and the Chicago River, the city, by another ordinance adopted September 15, 1856, granted it permission to enter and use, in perpetuity, for its line of railroad and other works necessary to protect the same from the lake, the space between its then breakwater and a line drawn from a point thereon seven hundred feet south of the north line of Randolph street extended, and running thence on a straight line to the southeast corner of



## Opinion of the Court.

its present breakwater, thence to the river; and the space thus indicated the railroad company occupied and continued to hold pursuant to this ordinance, and we do not perceive any valid objection to its continued holding of the same for the purposes declared — that is, as additional means of approaching and using its station grounds.

We proceed to consider the claim of the railroad company to the ownership of submerged lands in the harbor, and the right to construct such wharves, piers, docks and other works therein as it may deem proper for its interest and business. The claim is founded upon the third section of the act of the legislature of the State passed on the 16th of April, 1869, the material part of which is as follows:

“SEC. 3. The right of the Illinois Central Railroad Company under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten and fifteen, township and range as aforesaid, is hereby confirmed; and all the right and title of the State of Illinois in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company, for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one, south of and near to the round-house and machine shops of said company, in the south division of the said city of Chicago, are hereby granted in fee to the said Illinois Central Railroad Company, its successors and assigns: provided, however, that the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same; and that all gross receipts from use, profits, leases or otherwise of said lands, or the improvements



## Opinion of the Court.

thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: and provided also, that nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation; nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly which may be hereafter passed regulating the rates of wharfage and dockage to be charged in said harbor."

The act, of which this section is a part, was accepted by a resolution of the board of directors of the company at its office in the city of New York, July 6, 1870; but the acceptance was not communicated to the State until the 18th of November, 1870. A copy of the resolution was on that day forwarded to the Secretary of State, and filed and recorded by him in the records of his office. On the 15th of April, 1873, the legislature of Illinois repealed the act. The questions presented relate to the validity of the section cited of the act and the effect of the repeal upon its operation.

The section in question has two objects in view: one was to confirm certain alleged rights of the railroad company under the grant from the State in its charter and under and "by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident" thereto, in and to the lands submerged or otherwise lying east of a line parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten and fifteen. The other object was to grant to the railroad company submerged lands in the harbor.

The confirmation made, whatever the operation claimed for it in other respects, cannot be invoked so as to extend the riparian right which the company possessed, from its ownership of lands in sections ten and fifteen on the shore of the lake. Whether the piers or docks constructed by it, after the passage of the act of 1869, extend beyond the point of navigability in the waters of the lake, must be the subject of judicial

## Opinion of the Court.

inquiry upon the execution of this decree in the court below. If it be ascertained upon such inquiry and determined that such piers and docks do not extend beyond the point of practicable navigability, the claim of the railroad company to their title and possession will be confirmed; but if they or either of them are found on such inquiry to extend beyond the point of such navigability, then the State will be entitled to a decree that they, or the one thus extended, be abated and removed to the extent shown, or for such other disposition of the extension as, upon the application of the State and the facts established, may be authorized by law.

As to the grant of the submerged lands, the act declares that all the right and title of the State in and to the submerged lands, constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the company for the distance of one mile, and between the south line of the south pier extended eastwardly and a line extended eastwardly from the south line of lot twenty-one, south of and near to the round-house and machine shops of the company "are granted in fee to the railroad company, its successors and assigns." The grant is accompanied with a proviso that the fee of the lands shall be held by the company in perpetuity, and that it shall not have the power to grant, sell or convey the fee thereof. It also declares that nothing therein shall authorize obstructions to the harbor or impair the public right of navigation, or be construed to exempt the company from any act regulating the rates of wharfage and dockage to be charged in the harbor.

This clause is treated by the counsel of the company as an absolute conveyance to it of title to the submerged lands, giving it as full and complete power to use and dispose of the same, except in the technical transfer of the fee, in any manner it may choose, as if they were uplands, in no respect covered or affected by navigable waters, and not as a license to use the lands subject to revocation by the State. Treating it as such a conveyance, its validity must be determined by the consideration whether the legislature was competent to make a grant of the kind.

The act, if valid and operative to the extent claimed, placed

## Opinion of the Court.

under the control of the railroad company nearly the whole of the submerged lands of the harbor, subject only to the limitations that it should not authorize obstructions to the harbor or impair the public right of navigation, or exclude the legislature from regulating the rates of wharfage or dockage to be charged. With these limitations the act put it in the power of the company to delay indefinitely the improvement of the harbor, or to construct as many docks, piers and wharves and other works as it might choose, and at such positions in the harbor as might suit its purposes, and permit any kind of business to be conducted thereon, and to lease them out on its own terms, for indefinite periods. The inhibition against the technical transfer of the fee of any portion of the submerged lands was of little consequence when it could make a lease for any period and renew it at its pleasure. And the inhibitions against authorizing obstructions to the harbor and impairing the public right of navigation placed no impediments upon the action of the railroad company which did not previously exist. A corporation created for one purpose, the construction and operation of a railroad between designated points, is, by the act, converted into a corporation to manage and practically control the harbor of Chicago, not simply for its own purpose as a railroad corporation, but for its own profit generally.

The circumstances attending the passage of the act through the legislature were on the hearing the subject of much criticism. As originally introduced, the purpose of the act was to enable the city of Chicago to enlarge its harbor and to grant to it the title and interest of the State to certain lands adjacent to the shore of Lake Michigan on the eastern front of the city, and place the harbor under its control, giving it all the necessary powers for its wise management. But during the passage of the act its purport was changed. Instead of providing for the cession of the submerged lands to the city, it provided for a cession of them to the railroad company. It was urged that the title of the act was not changed to correspond with its changed purpose, and an objection was taken to its validity on that account. But the majority of the court were of opinion that the evidence was insufficient to show that



## Opinion of the Court.

the requirement of the constitution of the State, in its passage, was not complied with.

The question, therefore, to be considered is whether the legislature was competent to thus deprive the State of its ownership of the submerged lands in the harbor of Chicago, and of the consequent control of its waters; or, in other words, whether the railroad corporation can hold the lands and control the waters by the grant, against any future exercise of power over them by the State.

That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown, and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to preemption and sale. It is a title held in trust for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties. The interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks and piers therein, for which purpose the State may grant parcels of the submerged lands; and, so long as their disposition is made for such purpose, no valid objections can be made to the grants. It is grants of parcels of lands under navigable waters, that may afford foundation for wharves, piers, docks and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the lands and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the State. But that is a very different doctrine from the one which would sanction the abdication of the general control of the State over lands under the



## Opinion of the Court.

navigable waters of an entire harbor or bay, or of a sea or lake. Such abdication is not consistent with the exercise of that trust which requires the government of the State to preserve such waters for the use of the public. The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining. It is only by observing the distinction between a grant of such parcels for the improvement of the public interest, or which when occupied do not substantially impair the public interest in the lands and waters remaining, and a grant of the whole property in which the public is interested, that the language of the adjudged cases can be reconciled. General language sometimes found in opinions of the courts, expressive of absolute ownership and control by the State of lands under navigable waters, irrespective of any trust as to their use and disposition, must be read and construed with reference to the special facts of the particular cases. A grant of all the lands under the navigable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation. The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace. In the administration of government the use of such powers may for a limited period be delegated to a municipality or other body, but there always remains with the State the right to

## Opinion of the Court.

revoke those powers and exercise them in a more direct manner, and one more conformable to its wishes. So with trusts connected with public property, or property of a special character, like lands under navigable waters, they cannot be placed entirely beyond the direction and control of the State.

The harbor of Chicago is of immense value to the people of the State of Illinois in the facilities it affords to its vast and constantly increasing commerce; and the idea that its legislature can deprive the State of control over its bed and waters and place the same in the hands of a private corporation created for a different purpose, one limited to transportation of passengers and freight between distant points and the city, is a proposition that cannot be defended.

The area of the submerged lands proposed to be ceded by the act in question to the railroad company embraces something more than a thousand acres, being, as stated by counsel, more than three times the area of the outer harbor, and not only including all of that harbor but embracing adjoining submerged lands which will, in all probability, be hereafter included in the harbor. It is as large as that embraced by all the merchandise docks along the Thames at London; is much larger than that included in the famous docks and basins at Liverpool; is twice that of the port of Marseilles, and nearly if not quite equal to the pier area along the water front of the city of New York. And the arrivals and clearings of vessels at the port exceed in number those of New York, and are equal to those of New York and Boston combined. Chicago has nearly twenty-five per cent of the lake carrying trade as compared with the arrivals and clearings of all the leading ports of our great inland seas. In the year ending June 30, 1886, the joint arrivals and clearances of vessels at that port amounted to twenty-two thousand and ninety-six, with a tonnage of over seven millions; and in 1890 the tonnage of the vessels reached nearly nine millions. As stated by counsel, since the passage of the Lake Front Act, in 1869, the population of the city has increased nearly a million souls, and the increase of commerce has kept pace with it. It is hardly conceivable that the legislature can divest the State of the control

## Opinion of the Court.

and management of this harbor and vest it absolutely in a private corporation. Surely an act of the legislature transferring the title to its submerged lands and the power claimed by the railroad company, to a foreign State or nation would be repudiated, without hesitation, as a gross perversion of the trust over the property under which it is held. So would a similar transfer to a corporation of another State. It would not be listened to that the control and management of the harbor of that great city — a subject of concern to the whole people of the State — should thus be placed elsewhere than in the State itself. All the objections which can be urged to such attempted transfer may be urged to a transfer to a private corporation like the railroad company in this case.

Any grant of the kind is necessarily revocable, and the exercise of the trust by which the property was held by the State can be resumed at any time. Undoubtedly there may be expenses incurred in improvements made under such a grant which the State ought to pay; but, be that as it may, the power to resume the trust whenever the State judges best is, we think, incontrovertible. The position advanced by the railroad company in support of its claim to the ownership of the submerged lands and the right to the erection of wharves, piers and docks at its pleasure, or for its business in the harbor of Chicago, would place every harbor in the country at the mercy of a majority of the legislature of the State in which the harbor is situated.

We cannot, it is true, cite any authority where a grant of this kind has been held invalid, for we believe that no instance exists where the harbor of a great city and its commerce have been allowed to pass into the control of any private corporation. But the decisions are numerous which declare that such property is held by the State, by virtue of its sovereignty, in trust for the public. The ownership of the navigable waters of the harbor and of the lands under them is a subject of public concern to the whole people of the State. The trust with which they are held, therefore, is governmental and cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest thus held, or when parcels



## Opinion of the Court.

can be disposed of without detriment to the public interest in the lands and waters remaining.

This follows necessarily from the public character of the property, being held by the whole people for purposes in which the whole people are interested. As said by Chief Justice Taney, in *Martin v. Waddell*, 16 Pet. 367, 410: "When the Revolution took place the people of each State became themselves sovereign, and in that character hold the absolute right to all their navigable waters, and the soils under them, for their own common use, subject only to the rights since surrendered by the Constitution to the general government." In *Arnold v. Mundy*, 1 Halsted, 1, which is cited by this court in *Martin v. Waddell*, 16 Pet. 418, and spoken of by Chief Justice Taney as entitled to great weight, and in which the decision was made "with great deliberation and research," the Supreme Court of New Jersey comments upon the rights of the State in the bed of navigable waters, and, after observing that the power exercised by the State over the lands and waters is nothing more than what is called the *jus regium*, the right of regulating, improving and securing them for the benefit of every individual citizen, adds: "The sovereign power, itself, therefore, cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the State, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people." Necessarily must the control of the waters of a State over all lands under them pass when the lands are conveyed in fee to private parties, and are by them subjected to use.

In the case of *Stockton v. Baltimore and New York Railroad Company*, 32 Fed. Rep. 9, 19, 20, which involved a consideration by Mr. Justice Bradley, late of this court, of the nature of the ownership by the State of lands under the navigable waters of the United States, he said:

"It is insisted that the property of the State in lands under its navigable waters is private property, and comes strictly within the constitutional provision. It is significantly asked,



## Opinion of the Court.

can the United States take the state house at Trenton, and the surrounding grounds belonging to the State, and appropriate them to the purposes of a railroad depot, or to any other use of the general government, without compensation? We do not apprehend that the decision of the present case involves or requires a serious answer to this question. The cases are clearly not parallel. The character of the title or ownership by which the State holds the state house is quite different from that by which it holds the land under the navigable waters in and around its territory. The information rightly states that, prior to the Revolution, the shore and lands under water of the navigable streams and waters of the province of New Jersey belonged to the King of Great Britain as part of the *jura regalia* of the crown, and devolved to the State by right of conquest. The information does not state, however, what is equally true, that, after the conquest, the said lands were held by the State, as they were by the king, *in trust* for the public uses of navigation and fishery, *and the erection* thereon of wharves, piers, light-houses, beacons and other facilities of navigation and commerce. Being subject to this trust, they were *publici juris*; in other words, they were held for the use of the people at large. It is true that to utilize the fisheries, especially those of shell fish, it was necessary to parcel them out to particular operators, and employ the rent or consideration for the benefit of the whole people; but this did not alter the character of the title. The land remained subject to all other public uses as before, especially to those of navigation and commerce, which are always paramount to those of public fisheries. It is also true that portions of the submerged shoals and flats, which really interfered with navigation, and could better subserve the purposes of commerce by being filled up and reclaimed, were disposed of to individuals for that purpose. But neither did these dispositions of useless parts affect the character of the title to the remainder."

Many other cases might be cited where it has been decided that the bed or soil of navigable waters is held by the people of the State in their character as sovereign in trust for public

## Opinion of the Court.

uses for which they are adapted. *Martin v. Waddell*, 16 Pet. 367, 410; *Pollard's Lessee v. Hagan*, 3 How. 212, 220; *McCready v. Virginia*, 94 U. S. 391, 394.

In *People v. New York and Staten Island Ferry Co.*, 68 N. Y. 71, 76, the Court of Appeals of New York said :

"The title to lands under tide waters, within the realm of England, were, by the common law, deemed to be vested in the king as a public trust, to subserve and protect the public right to use them as common highways for commerce, trade and intercourse. The king, by virtue of his proprietary interest could grant the soil so that it should become private property, but his grant was subject to the paramount right of public use of navigable waters, which he could neither destroy nor abridge. In every such grant there was an implied reservation of the public right, and so far as it assumed to interfere with it, or to confer a right to impede or obstruct navigation, or to make an exclusive appropriation of the use of navigable waters, the grant was void. In his treatise *De Jure Maris* (p. 22) Lord Hale says: 'The *jus privatum* that is acquired by the subject, either by patent or prescription, must not prejudice the *jus publicum*, wherewith public rivers and the arms of the sea are affected to public use;' and Mr. Justice Best, in *Blundell v. Catterall*, 5 B. & A. 268, in speaking of the subject, says: 'The soil can only be transferred subject to the public trust, and general usage shows that the public right has been excepted out of the grant of the soil.' . . .

"The principle of the common law to which we have adverted is founded upon the most obvious principles of public policy. The sea and navigable rivers are natural highways, and any obstruction to the common right, or exclusive appropriation of their use, is injurious to commerce, and if permitted at the will of the sovereign, would be very likely to end in materially crippling, if not destroying it. The laws of most nations have sedulously guarded the public use of navigable waters within their limits against infringement, subjecting it only to such regulation by the State, in the interest of the public, as is deemed consistent with the preservation of the public right."

## Opinion of the Court.

While the opinion of the New York court contains some expressions which may require explanation when detached from the particular facts of that case, the general observations we cite are just and pertinent.

The soil under navigable waters being held by the people of the State in trust for the common use and as a portion of their inherent sovereignty, any act of legislation concerning their use affects the public welfare. It is, therefore, appropriately within the exercise of the police power of the State.

In *Newton v. Commissioners*, 100 U. S. 548, it appeared that by an act passed by the legislature of Ohio, in 1846, it was provided that upon the fulfilment of certain conditions by the proprietors or citizens of the town of Canfield, the county seat should be permanently established in that town. Those conditions having been complied with, the county seat was established therein accordingly. In 1874 the legislature passed an act for the removal of the county seat to another town. Certain citizens of Canfield thereupon filed their bill, setting forth the act of 1846, and claiming that the proceedings constituted an executed contract, and prayed for an injunction against the contemplated removal. But the court refused the injunction, holding that there could be no contract and no irrevocable law upon governmental subjects, observing that legislative acts concerning public interests are necessarily public laws; that every succeeding legislature possesses the same jurisdiction and power as its predecessor; that the latter have the same power of repeal and modification which the former had of enactment, neither more nor less; that all occupy in this respect a footing of perfect equality; that this is necessarily so in the nature of things; that it is vital to the public welfare that each one should be able, at all times, to do whatever the varying circumstances and present exigencies attending the subject may require; and that a different result would be fraught with evil.

As counsel observe, if this is true doctrine as to the location of a county seat it is apparent that it must apply with greater force to the control of the soils and beds of navigable waters in the great public harbors held by the people in trust for



## Opinion of the Court.

their common use and of common right as an incident to their sovereignty. The legislature could not give away nor sell the discretion of its successors in respect to matters, the government of which, from the very nature of things, must vary with varying circumstances. The legislation which may be needed one day for the harbor may be different from the legislation that may be required at another day. Every legislature must, at the time of its existence, exercise the power of the State in the execution of the trust devolved upon it. We hold, therefore, that any attempted cession of the ownership and control of the State in and over the submerged lands in Lake Michigan, by the act of April 16, 1869, was inoperative to affect, modify or in any respect to control the sovereignty and dominion of the State over the lands, or its ownership thereof, and that any such attempted operation of the act was annulled by the repealing act of April 15, 1873, which to that extent was valid and effective. There can be no irrepealable contract in a conveyance of property by a grantor in disregard of a public trust, under which he was bound to hold and manage it.

The legislation of the State in the Lake Front Act, purporting to grant the fee of the submerged lands mentioned to the railroad company, was considered by the court below, in view of the preceding measures taken for the improvement of the harbor, and because further improvement in the same direction was contemplated, as a mere license to the company to prosecute such further improvement as an agency of the State, and that to this end the State had placed certain of its resources at the command of the company with such an enlargement of its powers and privileges as enabled it to accomplish the objects in view. And the court below, after observing that the act might be assumed as investing the railroad company with the power, not given in its original charter, of erecting and maintaining wharves, docks and piers in the interest of commerce, and beyond the necessities or legitimate purposes of its own business as a railroad corporation, added that it was unable to perceive why it was not competent for the State, by subsequent legislation, to repeal the act and withdraw the additional powers of the company, thereby restricting it to the



## Opinion of the Court.

business for which it was incorporated, and to resume control of the resources and property which it had placed at the command of the company for the improvement of the harbor. The court, treating the act as a license to the company, also observed that it was deemed best, when that act was passed, for the public interest that the improvement of the harbor should be effected by the instrumentality of a railroad corporation interested, to some extent, in the accomplishment of that result, and said: "But if the State subsequently determined, upon consideration of public policy, that this great work should not be entrusted to any railroad corporation, and that a corporation should not be the owner of even a qualified fee in the soil under the navigable waters of the harbor, no provision of the national or State constitution forbade the general assembly of Illinois from giving effect, by legislation, to this change of policy. It cannot be claimed that the repeal of the act of 1869 took from the company a single right conferred upon it by its original charter. That act only granted additional powers and privileges for which the railroad company paid nothing, although, in consideration of the grant of such additional powers and privileges, it agreed to pay a certain per centum of the gross proceeds, receipts, and incomes which it *might* derive either from the lands granted by the act, or from any improvements erected thereon. But it was not absolutely bound, by anything contained in the act, to make use of the submerged lands for the purposes contemplated by the legislature—certainly not within any given time—and could not have been called upon to pay such per centum until after the lands were used and improved, and income derived therefrom. The repeal of the act relieved the corporation from any obligation to pay the per centum referred to, because it had the effect to take from it the property from which alone the contemplated income could be derived. So that the effect of the act of 1873 was only to remit the railroad company to the exercise of the powers, privileges and franchises granted in its original charter, and withdraw from it the additional powers given by the act of 1869 for the accomplishment of certain public objects." If the act in question

## Opinion of the Court.

be treated as a mere license to the company to make the improvement in the harbor contemplated as an agency of the State, then we think the right to cancel the agency and revoke its power is unquestionable.

It remains to consider the claim of the city of Chicago to portions of the east water front and how such claim, and the rights attached to it, are interfered with by the railroad company.

• The claim of the city is to the ownership in fee of the streets, alleys, ways, commons and other public grounds on the east front of the city bordering on the lake, as exhibited on the maps showing the subdivision of fractional sections ten and fifteen, prepared under the supervision and direction of United States officers in the one case and by the canal commissioners in the other, and duly recorded, and the riparian rights attached to such ownership. By a statute of Illinois the making, acknowledging and recording of the plats operated to vest the title to the streets, alleys, ways and commons, and other public grounds designated on such plats, in the city, in trust for the public uses to which they were applicable. *Canal Trustees v. Havens*, 11 Illinois, 556; *Chicago v. Rumsey*, 87 Illinois, 354.

Such property, besides other parcels, included the whole of that portion of fractional section fifteen which constitutes Michigan Avenue, and that part of the fractional section lying east of the west line of Michigan Avenue, and that portion of fractional section ten designated on one of the plats as "public ground," which was always to remain open and free from any buildings.

The estate, real and personal, held by the trustees of the town of Chicago was vested in the city of Chicago by the act of March 4, 1837. It followed that when the Lake Front Act of 1869 was passed the fee was in the city, subject to the public uses designated, of all the portions of section ten and fifteen, particularly described in the decree below. And we agree with the court below that the fee of the made or reclaimed ground between Randolph street and Park Row, embracing the ground upon which rest the tracks and the

## Opinion of the Court.

breakwater of the railroad company south of Randolph street, was in the city. The fact that the land which the city had a right to fill in and appropriate by virtue of its ownership of the grounds in front of the lake had been filled in by the railroad company in the construction of the tracks for its railroad and for the breakwater on the shore west of it, did not deprive the city of its riparian rights. The exercise of those rights was only subject to the condition of the agreement with the city, under which the tracks and breakwater were constructed by the railroad company, and that was for a perpetual right of way over the ground for its tracks of railway, and, necessarily, the continuance of the breakwater as a protection of its works and the shore from the violence of the lake. With this reservation of the right of the railroad company to its use of the tracts on ground reclaimed by it and the continuance of the breakwater, the city possesses the same right of riparian ownership, and is at full liberty to exercise it, which it ever did.

We also agree with the court below that the city of Chicago, as riparian owner of the grounds on its east or lake front of the city, between the north line of Randolph street and the north line of block twenty-three, each of the lines being produced to Lake Michigan, and in virtue of authority conferred by its charter, has the power to construct and keep in repair on the lake front, east of said premises, within the lines mentioned, public landing places, wharves, docks and levees, subject, however, in the execution of that power, to the authority of the State to prescribe the lines beyond which piers, docks, wharves and other structures, other than those erected by the general government, may not be extended into the navigable waters of the harbor, and to such supervision and control as the United States may rightfully exercise.

It follows from the views expressed, and it is so declared and adjudged, that the State of Illinois is the owner in fee of the submerged lands constituting the bed of Lake Michigan, which the third section of the act of April 16, 1869, purported to grant to the Illinois Central Railroad Company, and that the act of April 15, 1873, repealing the same is valid and effective



Dissenting Opinion: Shiras, Gray, Brown, JJ.

for the purpose of restoring to the State the same control, dominion and ownership of said lands that it had prior to the passage of the act of April 16, 1869.

But the decree below, as it respects the pier commenced in 1872, and the piers completed in 1880 and 1881, marked 1, 2, and 3, near Chicago River, and the pier and docks between and in front of Twelfth and Sixteenth streets, is modified so as to direct the court below to order such investigation to be made as may enable it to determine whether those piers erected by the company, by virtue of its riparian proprietorship of lots formerly constituting part of section ten, extend into the lake beyond the point of practical navigability, having reference to the manner in which commerce in vessels is conducted on the lake; and, if it be determined upon such investigation that said piers, or any of them, do not extend beyond such point, then that the title and possession of the railroad company to such piers shall be affirmed by the court; but if it be ascertained and determined that such piers, or any of them, do extend beyond such navigable point, then the said court shall direct the said pier or piers, to the excess ascertained, to be abated and removed, or that other proceedings relating thereto be taken on the application of the State as may be authorized by law; and also to order that similar proceedings be taken to ascertain and determine whether or not the pier and dock, constructed by the railroad company in front of the shore between Twelfth and Sixteenth streets extend beyond the point of navigability, and to affirm the title and possession of the company if they do not extend beyond such point, and, if they do extend beyond such point, to order the abatement and removal of the excess, or that other proceedings relating thereto be taken on application of the State as may be authorized by law.

*Except as modified in the particulars mentioned, the decree in each of the three cases on appeal must be affirmed, with costs against the railroad company; and it is so ordered.*

MR. JUSTICE SHIRAS, with whom concurred MR. JUSTICE GRAY and MR. JUSTICE BROWN, dissenting.



Dissenting Opinion: Shiras, Gray, Brown, JJ.

That the ownership of a State in the lands underlying its navigable waters is as complete, and its power to make them the subject of conveyance and grant is as full, as such ownership and power to grant in the case of the other public lands of the State, I have supposed to be well settled.

Thus it was said in *Weber v. Harbor Commissioners*, 18 Wall. 57, 65, that "upon the admission of California into the Union upon equal footing with the original States, absolute property in, and dominion and sovereignty over, all soils under the tide waters within her limits passed to the State, *with the consequent right to dispose of the title to any part of said soils* in such manner as she might deem proper, subject only to the paramount right of navigation over the waters, so far as such navigation might be required by the necessities of commerce with foreign nations or among the several States, the regulation of which was vested in the general government."

In *Hoboken v. Pennsylvania Railroad*, 124 U. S. 656, 657, — a case in many respects like the present — it was said: "Lands below high-water mark on navigable waters are the absolute property of the State, subject only to the power conferred upon Congress to regulate foreign commerce and commerce between the States, and *they may be granted by the State*, either to the riparian proprietors or to a stranger, as the State may see fit," and, accordingly, it was *held*, "that the grant by the State of New Jersey to the United Companies by the act of March 31, 1869, was intended to secure, and does secure, to the respective grantees the whole beneficial interest in their respective properties, for their exclusive use for the purposes expressed in the grants."

In *Stevens v. Paterson & Newark Railroad*, 5 Vroom, (34 N. J. Law,) 532, it was declared by the Court of Errors and Appeals of New Jersey that it was competent for the State to grant to a stranger lands constituting the shore of a navigable river under tide water below the tide-water mark, to be occupied and used with structures and improvements.

*Langdon v. New York City*, 93 N. Y. 129, 155, was a case in which it was said by the Court of Appeals of New York: "From the earliest times in England the law has vested the

## Dissenting Opinion: Shiras, Gray, Brown, JJ.

title to, and the control over, the navigable waters therein, in the crown and parliament. A distinction was taken between the mere ownership of the soil under water and the control over it for public purposes. The ownership of the soil, analogous to the ownership of dry land, was regarded as *jus privatum*, and was vested in the crown. But the right to use and control both the land and water was deemed a *jus publicum*, and was vested in parliament. The crown could convey the soil under water so as to give private rights therein, but the dominion and control over the waters, in the interest of commerce and navigation, for the benefit of all the subjects of the kingdom, could be exercised only by Parliament. . . . In this country, the State has succeeded to all the rights of both crown and parliament in the navigable waters and the soil under them, and here the *jus privatum* and the *jus publicum* are both vested in the State."

These citations might be indefinitely multiplied from authorities both Federal and State.

The State of Illinois, by her information or bill of complaint in this case, alleges that "the claims of the defendants are a great and irreparable injury to the State of Illinois as a proprietor and owner of the bed of the lake, throwing doubts and clouds upon its title thereto, and preventing an *advantageous sale or other disposition thereof*;" and in the prayer for relief the State asks that "its title may be established and confirmed, that the claims made by the railroad company may be declared to be unfounded, and that the State of Illinois may be declared to have the sole and exclusive right to develop the harbor of Chicago by the construction of docks, wharves, etc., and to *dispose of such rights at its pleasure*."

Indeed, the logic of the State's case, as well as her pleadings, attributes to the State entire power to hold and dispose of, by grant or lease, the lands in question; and her case is put upon the alleged invalidity of the title of the railroad company, arising out of the asserted unconstitutionality of the act of 1869, which act made the grant, by reason of certain irregularities in its passage and title, or, that ground failing, upon the right of the State to arbitrarily revoke the grant, as a

Dissenting Opinion: Shiras, Gray, Brown, JJ.

mere license, and which right she claims to have duly exercised by the passage of the act of 1873.

The opinion of the majority, if I rightly apprehend it, likewise concedes that a State does possess the power to grant the rights of property and possession in such lands to private parties, but the power is stated to be, in some way restricted to "small parcels, or where such parcels can be disposed of without detriment to the public interests in the lands and waters remaining." But it is difficult to see how the validity of the exercise of the power, if the power exists, can depend upon the size of the parcel granted, or how, if it be possible to imagine that the power is subject to such a limitation, the present case would be affected, as the grant in question, though doubtless a large and valuable one, is, relatively to the remaining soil and waters, if not insignificant, yet certainly, in view of the purposes to be effected, not unreasonable. It is matter of common knowledge that a great railroad system, like that of the Illinois Central Railroad Company, requires an extensive and constantly increasing territory for its terminal facilities.

It would seem to be plain that, if the State of Illinois has the power, by her legislature, to grant private rights and interests in parcels of soil under her navigable waters, the extent of such a grant and its effect upon the public interests in the lands and waters remaining are matters of legislative discretion.

Assuming, then, that the State of Illinois possesses the power to confer by grant, upon the Illinois Central Railroad Company, private rights and property in the lands of the State underlying the waters of the lake, we come to inquire whether she has exercised that power by a valid enactment, and if so, whether the grant so made has been legally revoked.

It was contended, on behalf of the State, that the act of 1869, purporting to confer upon the railroad company certain rights in the lands in question, did not really so operate, because the **record of proceedings** in the senate does not show that the bill was read three times during its passage, and because the title of the bill does not sufficiently express the purpose of the



## Dissenting Opinion: Shiras, Gray, Brown, JJ.

bill—both of which are constitutional requisites to valid legislation.

It is unnecessary to discuss these objections in this opinion, because the court below held them untenable, and because the opinion of the majority in this court adopts the reasoning and conclusion of the court below in this regard.

It was further contended, on behalf of the State, that, even if the act of 1869 were a valid exercise of legislative power, yet the grant thereby made did not vest in the railroad company rights and franchises in the nature of private property, but merely conferred upon the company certain powers for public purposes, which were taken and held by the company as an agency of the State, and which accordingly could be recalled by the State whenever, in her wisdom, she deemed it for the public interest to do so, without thereby infringing a contract existing between her and the railroad company.

This is a question that must be decided by the terms of the grant, read in the light of the nature of the power exercised, of the character of the railroad company as a corporation created to carry out public purposes, and of the facts and circumstances disclosed by the record.

It must be conceded, *in limine*, that, in construing this grant, the State is entitled to the benefit of certain well-settled canons of construction that pertain to grants by the State to private persons or corporations, as, for instance, that if there is any ambiguity or uncertainty in the act that interpretation must be put upon it which is most favorable to the State; that the words of the grant, being attributable to the party procuring the legislation, are to receive a strict construction as against the grantee; and that, as the State acts for the public good, we should expect to find the grant consistent with good morals and the general welfare of the State at large and of the particular community to be affected.

These are large concessions, and, of course, in order to defeat the grant, they ought not to be pushed beyond the bounds of reason, so as to result in a strained and improbable construction. Reasonable effect must be given to the language employed, and the manifest intent of the enactment must prevail.



Dissenting Opinion: Shiras, Gray, Brown, JJ.

By an act of Congress, approved September 20, 1850, 9 Stat. 466, c. 61, the right of way not exceeding 200 feet in width through the public lands was granted to the State of Illinois, for the construction of a railroad from the southern terminus of the Illinois and Michigan Canal in that State (at La Salle) to Cairo, at the confluence of the Ohio and Mississippi Rivers, with a branch from that line to Chicago, and another, *via* the city of Galena, to Dubuque, in the State of Iowa. A grant of public lands was also made to the State to aid in the construction of the railroad and branches, which, by the terms of the act, were to "be and remain a public highway for the use of the government of the United States, free from toll or other charge upon the transportation of any property or troops of the United States." It was also provided that the United States mail should at all times be transported on the said railroad under the direction of the Post Office Department at such price as the Congress might by law direct.

This act of Congress was formally accepted by the legislature of the State, February 17, 1851. Laws of Ill., 1851, 192, 193. Seven days before the acceptance — February 10, 1851 — the Illinois Central Railroad Company was incorporated for the purpose of constructing, maintaining and operating the railroad and branches contemplated in the act of Congress.

By the second section of its charter, the company was authorized and empowered "to survey, locate, construct, complete, alter, maintain and operate a railroad with one or more tracks or lines of rails, from the southern terminus of the Illinois and Michigan Canal to a point at the city of Cairo, with a branch of the same to the city of Chicago on Lake Michigan, and also a branch *via* the city of Galena to a point on the Mississippi River opposite the town of Dubuque in the State of Iowa."

It was provided in the third section that "the said corporation shall have the right of way upon, and may appropriate to its sole use and control for the purposes contemplated herein, land not exceeding two hundred feet in width through its entire length; may enter upon and take possession of and use all and

Dissenting Opinion : Shiras, Gray, Brown, JJ.

singular any lands, streams and materials of every kind, for the location of depots and stopping stages, for the purpose of constructing bridges, dams, embankments, excavations, station grounds, spoil banks, turnouts, engine houses, shops and other buildings necessary for the construction, completing, altering, maintaining, preserving and complete operation of said road. All such lands, waters, materials and privileges belonging to the State are hereby granted to said corporation for said purposes; but when owned or belonging to any person, company or corporation, and cannot be obtained by voluntary grant or release, the same may be taken and paid for, if any damages are awarded, in the manner provided in 'An act to provide for a general system of railroad incorporations,' approved November 5, 1849, and the final decision or award shall vest in the corporation hereby created all the rights, franchises and immunities in said act contemplated and provided."

The eighth section had the following provision: "Nothing in this act contained shall authorize said corporation to make a location of their track within any city without the consent of the common council of said city."

By the fifteenth section, the right of way and all the lands granted to the State by the act of Congress before mentioned, and also the right of way over and through lands owned by the State, were ceded and granted to the corporation for the "purpose of surveying, locating, constructing, completing, altering, maintaining and operating said road and branches." There was a requirement in this section (clause 3) that the railroad should be built into the city of Chicago.

By the eighteenth section, the company was required, in consideration of the grants, privileges and franchises conferred, to pay into the treasury of the State, on the first Monday of December and June of each year, five per centum of the gross receipts of the road and branches for the six months then next preceding.

The twenty-second section provided for the assessment of an annual tax for state purposes upon all the property and assets of the corporation; and if this tax and the five per cent charge upon the gross receipts should not amount to seven per cent

Dissenting Opinion: Shiras, Gray, Brown, JJ.

of the total proceeds, receipts or income of the company, it was required to pay the difference into the State treasury, "so as to make the whole amount paid equal at least to seven per cent of the gross receipts of said corporation." Exemption was granted in that section from "all taxation of every kind, except as herein provided for."

The act of November 5, 1849, referred to in the third section of the charter, provided a mode for condemning land required for railroad uses, and contained an express provision that upon the entry of judgment the corporation "shall become seized in fee of all the lands and real estate described during the continuance of the corporation." 2 Laws of Illinois, 1849, 27.

The consent of the common council to the location of the railroad within the city of Chicago was given by an ordinance passed June 14, 1852.

On the 16th of April, 1869, an act was passed by the legislature of Illinois, entitled "An act in relation to a portion of the submerged lands and Lake Park grounds lying on and adjacent to the shore of Lake Michigan, on the eastern frontage of the city of Chicago." The third section of this act provided as follows:

"SEC. 3. The right of the Illinois Central Railroad Company, under the grant from the State in its charter, which said grant constitutes a part of the consideration for which the said company pays to the State at least seven per cent of its gross earnings, and under and by virtue of its appropriation, occupancy, use and control, and the riparian ownership incident to such grant, appropriation, occupancy, use and control, in and to the lands submerged or otherwise lying east of the said line running parallel with and four hundred feet east of the west line of Michigan Avenue, in fractional sections ten (10) and fifteen (15), township and range as aforesaid, is hereby confirmed; and all the right and title of the State of Illinois, in and to the submerged lands constituting the bed of Lake Michigan, and lying east of the tracks and breakwater of the Illinois Central Railroad Company for the distance of one mile, and between the south line of the south pier extended eastwardly, and a line extended eastward from the south line



Dissenting Opinion : Shiras, Gray, Brown, JJ.

of lot twenty-one, south of and near to the round-house and machine shops of said company, in the south division of the said city of Chicago, are hereby granted, in fee, to the said Illinois Central Railroad Company, its successor and assigns: *Provided, however*, That the fee to said lands shall be held by said company in perpetuity, and that the said company shall not have power to grant, sell or convey the fee to the same, and that all gross receipts from use, profits, leases or otherwise of said lands or the improvements thereon, or that may hereafter be made thereon, shall form a part of the gross proceeds, receipts and income of the said Illinois Central Railroad Company, upon which said company shall forever pay into the State treasury, semi-annually, the per centum provided for in its charter, in accordance with the requirements of said charter: *And provided, also*, That nothing herein contained shall authorize obstructions to the Chicago harbor, or impair the public right of navigation, nor shall this act be construed to exempt the Illinois Central Railroad Company, its lessees or assigns, from any act of the general assembly, which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor: *And provided further*, That any of the lands hereby granted to the Illinois Central Railroad Company, and the improvements now or which may hereafter be on the same, which shall hereafter be leased by said Illinois Central Railroad Company to any person or corporation, or which may hereafter be occupied by any person or corporation other than said Illinois Central Railroad Company, shall not, during the continuance of such leasehold estate or of such occupancy, be exempt from municipal or other taxation." Ill. Laws 1869, 245, 246, 247.

By this act, the right of the railroad company to all the lands it had appropriated and occupied, lying east of a line drawn parallel to, and four hundred feet east of, the west line of Michigan Avenue, in fractional sections ten and fifteen, was confirmed; and a further grant was made to the company of the submerged lands lying east of its tracks and breakwater, within the distance of one mile therefrom, between the south line of the south pier extended eastwardly and a line extended eastward from the south line of lot twenty-one.



Dissenting Opinion: Shiras, Gray, Brown, JJ.

What is the fair and natural import of the language used?

So long as the act stands in force there seems to me to exist a *contract*, whereby the Illinois Central Company is to have and enjoy perpetual possession and control of the lands in question, with the right to improve the same and take the rents, issues and profits thereof, provided always that the company shall not have the power to sell or alien such lands, nor shall the company be authorized to maintain obstructions to the Chicago harbor, or to impair the public right of navigation; nor shall the company, its lessees or assigns, be exempted from any act of the general assembly, which may be hereafter passed, regulating the rates of wharfage and dockage to be charged in said harbor, and whereby, in consideration of the grant of these rights and privileges, it shall be the duty of the company to pay, and the right of the State to receive, seven per cent of the gross receipts of the railroad company from "use, profits, leases or otherwise, of said land or the improvements thereon, or that may be hereafter made thereon."

Should the railroad company attempt to disregard the restraint on alienating the said lands, the State can, by judicial proceeding, enjoin such an act, or can treat it as a legal ground of forfeiting the grant; or, if the railroad company fails or refuses to pay the per centum provided for, the State can enforce such payment by suit at law, and possibly by proceedings to forfeit the grant. But so long as the railroad company shall fulfil its part of the agreement, so long is the State of Illinois inhibited by the Constitution of the United States from passing any act impairing the obligation of the contract.

Doubtless there are limitations, both expressed and implied, on the title to and control over these lands by the company. As we have seen, the company is expressly forbidden to obstruct Chicago harbor, or to impair the public right of navigation. So, from the nature of the railroad corporation and of its relation to the State and the public, the improvements put upon these lands by the company must be consistent with their duties as common carriers, and must be calculated to

## Dissenting Opinion: Shiras, Gray, Brown, JJ.

promote the efficiency of the railroad in the receipt and shipment of freight from and by the lake. But these are incidents of the grant and do not operate to defeat it.

To prevent misapprehension, it may be well to say that it is not pretended in this view of the case that the State can part, or has parted, by contract, with her sovereign powers. The railroad company takes and holds these lands subject at all times to the same sovereign powers in the State as obtain in the case of other owners of property. Nor can the grant in this case be regarded as in any way hostile to the powers of the general government in the control of harbors and navigable waters.

The able and interesting statement, in the opinion of the majority, of the rights of the public in the navigable waters, and of the limitation of the powers of the State to part with its control over them, is not dissented from. But its pertinency in the present discussion is not clearly seen. It will be time enough to invoke the doctrine of the inviolability of public rights when and if the railroad company shall attempt to disregard them.

Should the State of Illinois see, in the great and unforeseen growth of the city of Chicago and of the lake commerce, reason to doubt the prudence of her legislature in entering into the contract created by the passage and acceptance of the act of 1869, she can take the rights and property of the railroad company in these lands by a constitutional condemnation of them. So, freed from the shackles of an undesirable contract, she can make, as she expresses in her bill the desire to do, a "more advantageous sale or disposition to other parties," without offence to the law of the land.

The doctrine that a State, by making a grant to a corporation of her own creation, subjects herself to the restraints of law judicially interpreted, has been impugned by able political thinkers, who may, perhaps, find in the decision of the court in the present case some countenance of their views. But I am unable to suppose that there is any intention on the part of this court to depart from its doctrine so often expressed.

Dissenting Opinion: Shiras, Gray, Brown, JJ.

"We have no knowledge of any authority or principle which could support the doctrine that a legislative grant is revocable in its own nature, and held only *durante bene placito*. Such a doctrine . . . is utterly inconsistent with a great and fundamental principle of a republican government, the right of the citizens to the free enjoyment of their property legally acquired."

"A private corporation created by the legislature may lose its franchises by a *misuser* or *non-user* of them, and they may be resumed by the government under a judicial judgment upon a *quo warranto* to ascertain and enforce the forfeiture. . . . But that the legislature can repeal statutes creating private corporations, or confirming to them property already acquired under the faith of previous laws, and by such repeal can vest the property of such corporations exclusively in the State, or dispose of the same to such purposes as they may please, without the consent or default of the corporators, we are not prepared to admit; and we think ourselves standing upon the principles of natural justice, upon the fundamental laws of every free government, upon the spirit and the letter of the Constitution of the United States, and upon the decisions of most respectable judicial tribunals, in resisting such a doctrine." *Terrett v. Taylor*, 9 Cranch, 43, 51, 52.

In *Stone v. Mississippi*, 101 U. S. 814, 816, Chief Justice Waite, in delivering the opinion of the court, said: "It is now too late to contend that any contract which a State actually enters into, when granting a charter to a private corporation, is not within the protection of the clause in the Constitution of the United States that prohibits States from passing laws impairing the obligation of contracts. The doctrines of *Trustees of Dartmouth College v. Woodward*, 4 Wheat. 518, announced by this court more than sixty years ago, have become so imbedded in the jurisprudence of the United States as to make them to all intents and purposes a part of the Constitution itself."

The obvious conclusion from the foregoing view of the case is that the act of 1873, as an arbitrary act of revocation, not passed in the exercise of any reserved power, is void, that the

## Statement of the Case.

decree of the court below should be reversed, and that that court should be directed to enter a decree dismissing the bill of the State of Illinois and the cross-bill of the city of Chicago.

I am authorized to state that MR. JUSTICE GRAY and MR. JUSTICE BROWN concur in this dissent. .

The CHIEF JUSTICE, having been of counsel in the court below, and MR. JUSTICE BLATCHFORD, being a stockholder in the Illinois Central Railroad Company, did not take any part in the consideration or decision of these cases.

---



**Comment in the Harvard Law Review of May, 1893,  
by Merritt Starr, Esq., of the Chicago Bar, upon a  
Note in the March Number of that Journal upon  
the Lake Front Decision.**

Mr. Starr says in part: "Your note seems to reflect unfavorably upon the opinion of the court. Among other things it contains the following:

"The decision must be that any large grant of the kind is a license revocable by the legislature whenever in the judgment of the court such interpretation would largely promote the pecuniary welfare of the people; for it is here only pecuniary welfare that is affected; the community saves what constitutional confiscation would cost.'

"The fundamental character of the decision leads me to hope that you will permit me, as an alumnus of the law school, to indicate briefly some reasons for believing that this is an inaccurate interpretation of the decision.

"In the opinion Mr. Justice Field says: 'That the State holds the title to the lands under the navigable waters of Lake Michigan, within its limits, in the same manner that the State holds title to soils under tide water, by the common law, we have already shown; and that title necessarily carries with it control over the waters above them whenever the lands are subjected to use. But it is a title different in character from that which the State holds in lands intended for sale. It is different from the title which the United States hold in the public lands which are open to pre-emption and sale. It is a title held in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties. . . . A grant of all the lands under the navi-

gable waters of a State has never been adjudged to be within the legislative power; and any attempted grant of the kind would be held, if not absolutely void on its face, as subject to revocation.'

"This is hardly an admission of a power to grant such property.

"The difference shown by the court between property in lands *held for sale* by the State, and land which is *not held for sale* by the State, is most important.

"The lands acquired by the United States from other governments were acquired by grant, and lie in grant—they are made the subjects of barter and sale, and held for the purpose of sale. But the title and dominion of the government over the harbors of the realm, and over the submerged lands of the harbors, was not acquired by grant, and does not lie in grant. The title of the people of a State in such harbors and lands is not derived. It is incidental to and inherent in the sovereign people of the State. It has such title and dominion independent of the ownership of adjacent lands. It is a portion of the royalties belonging to the government, and held in trust for public purposes, of navigation and fishery. (*Hardin v. Jordan*, 140 U. S. 381; *Martin v. Waddell*, 16 Pet. 367, 410; *McCready v. Virginia*, 94 U. S. 394, 395; *Union Depot Co. v. Brunswick*, 31 Minn. 303; *Smith v. Maryland*, 18 How. 75; *Providence Engine Co v. Steamship Co.*, 12 R. I. 348, 356; *Pollard's Lessee v. Files*, 2 How. 591; *Weber v. Harbor Commissioners*, 18 Wall. 57.)

"Under these rules of law no grant of this property could have validity except in carrying out the purposes of the trust in such property; and the designation of a public agency for accomplishing such public purposes can be changed from time to time. This has been repeatedly held by the same court. In *East Hartford v. Hartford Bridge Co.*, (10 How. 511, 534,) it is said:

"'One of the highest attributes and duties of a legislature is to regulate public matters with all public bodies,

no less than the community, from time to time, in the manner which the public welfare may appear to demand.

“It can neither *devolve these duties permanently on other public bodies*, nor permanently suspend or abandon them itself. . . .

“It is bound also to *continue to regulate such public matters and bodies* as much as to organize them at first.

“Where not restrained by some constitutional provision, this power is inherent in its nature, design, and attitude; and the community possesses as deep and permanent an interest in such power remaining in and being exercised by the legislature, when the public progress and welfare demand it, as individuals or corporations can, in any instance, possess in restraining it.’

“The court held that the franchise in that case was not a contract protected by the Constitution, not only because the town which held the franchise of the public was a municipal and political corporation, but because in granting the franchise the legislature was acting ‘in relation to a public object, being virtually a highway across the river over another highway up and down the river.’ And the court say that whatever in the nature of a contract could be considered to exist in such a case, there must be implied in it a condition that the power still remained, or was reserved, in the legislature to modify or discontinue the privilege in the future as the public interests from time to time seem to require.

“The argument for the railway company seeks to justify the grant of public right to the railway company on the ground that it is a public corporation, and on the ground of the public character of the grant, and then claim for the grant the protection of private contracts, on the ground that the railway company is a mere private corporation. The grant cannot be so justified without, by the same argument, removing it from the protection of private contracts.

“Your note states that the arguments of the minority

are very hard to escape; that the power to grant such land, the minority of the court reason, is admitted by the majority, and it is difficult to say by what principle the extent of the grant is to be limited, as that is a matter of legislative discretion, having regard to the reasonable connection of the means to the end; and that it is impossible to say that the amount of land granted in this case is absurdly beyond the needs of a great railroad for its terminal facilities.

“The difficulty with this position and with the dissenting opinion of Judge Shiras seems to me to be that the granting of land for terminal facilities for a railroad is not the proper purpose to which to devote the public waters of the State and the submerged lands thereunder, in promotion of the trust on which it is held; so that the needs of a great railroad for its terminal facilities is not a fair test of the reasonableness of the extent of the grant. An examination of the former holdings of the court, I think, will remove the difficulty that the writer of the note discovers. The principle laid down in *Terrett v. Taylor*, (9 Cranch,) that a legislative grant is not revocable, must be held to apply to that which is properly the subject-matter of such a grant, *e. g.*, public lands held for sale. Else the integrity of our institutions might be very seriously impaired if whatever of public right the legislature should see fit to make the subject of a grant is to be held to be beyond recall.

“There are some things which the legislature cannot permanently grant away; its title to the harbors of the country is one.”







The term "high seas," in section 5346 of the Revised Statutes, applicable to the open, unenclosed waters of the Great Lakes.

---

O P I N I O N  
OF THE  
UNITED STATES SUPREME COURT  
IN  
UNITED STATES vs. RODGERS,  
Delivered at October Term, 1893,  
BY  
MR. JUSTICE FIELD.

---

STATEMENT OF THE CASE.

In February, 1888, the defendant, Robert S. Rodgers and others, were indicted in the District Court of the United States for the Eastern District of Michigan for assaulting, in August, 1887, with a dangerous weapon, one James Downs, on board of the steamer Alaska, a vessel belonging to citizens of the United States, and then being within the admiralty jurisdiction of the United States, and not within the jurisdiction of any particular State of the United States, viz., within the territorial limits of the Dominion of Canada.

The indictment contained six counts, charging the offence to have been committed in different ways, or with different intent, and was remitted to the Circuit Court for the Sixth Circuit and Eastern District of Michigan. There the defendant Rodgers filed a plea to the jurisdiction of the court, alleging that it had no jurisdiction of the matters charged, as appeared on the face of the indictment, and to the plea a demurrer was filed. Upon this demurrer the judges of the Circuit Court were divided in opinion, and they have transmitted to this court the following certificate of division :

*“ Certificate of Division of Opinion.*

“United States of America. The Circuit Court of the United States  
for the Sixth Circuit and Eastern District of Michigan.

“The United States }  
    *vs.*  
Robert S. Rodgers. }

“The defendant in this cause was indicted on the twenty-fourth day of February, in the year of our Lord one thousand eight hundred and eighty-

eight, in the District Court of the United States for the Eastern District of Michigan, together with John Gustave Beyers and others, charged, under section 5346 of the Revised Statutes of the United States, with having made an assault with dangerous weapons upon one James Downs, the assault having taken place on the steamer Alaska, a vessel owned by citizens of the United States, while such vessel was in the Detroit River, out of the jurisdiction of any particular State of the United States and within the territorial limits of the Dominion of Canada, and the said Robert S. Rodgers, and the others indicted with him, having first, after the assault, come into the United States in the Eastern District of Michigan.

"On the twentieth day of September, in the year of our Lord one thousand eight hundred and eighty-nine, the defendant Rodgers was arrested, and on the same day the indictment was, on motion of the United States attorney for the Eastern District of Michigan, and by order of the District Court for such district, remitted to the Circuit Court for such district, and, with all proceedings theretofore taken, certified to such Circuit Court.

"On the twenty-third day of September, in the year of our Lord one thousand eight hundred and eighty-nine, the defendant, on being called upon to plead in the Circuit Court of the United States for the Eastern District of Michigan, by permission of the court pleaded in abatement to the jurisdiction of the court, claiming that under section 5346 of the Revised Statutes of the United States the courts of the United States have no jurisdiction of offences committed in the Detroit River on a vessel of the United States within the territorial limits of the Dominion of Canada.

"The United States, by C. P. Black, United States attorney, and Charles T. Wilkins, assistant United States attorney for the Eastern District of Michigan, demurred to such plea, and the defendant joined on demurrer.

"The matter of the plea of the jurisdiction coming on to be heard in the Circuit Court of the United States for the Eastern District of Michigan, on the third day of October, in the year of our Lord one thousand eight hundred and eighty-nine, before the circuit and district judges, and the defendant being present in court, the said circuit and district judges were divided in opinion on the question: '*Whether the courts of the United States have jurisdiction, under section 5346 of the Revised Statutes of the United States, to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State and within the territorial limits of the Dominion of Canada.*'

"And so, at the request of the defendant and of the United States attorney for this district, the circuit and district judges do hereby at the same term state this point upon which they disagree, and hereby direct the same to be certified under the seal of the Circuit Court of the United States for the Eastern District of Michigan to the Supreme Court of the United States at its next session, for its opinion thereon.

"HOWELL E. JACKSON, *Circuit Judge.*

"HENRY B. BROWN, *District Judge.*"



Section 5346 of the Revised Statutes, upon which the indictment was found, is as follows:

“SEC. 5346. Every person who, upon the high seas, or in any arm of the sea, or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, on board any vessel belonging in whole or in part to the United States, or any citizen thereof, with a dangerous weapon, or with intent to perpetrate any felony, commits an assault on another shall be punished by a fine of not more than three thousand dollars and by imprisonment at hard labor not more than three years.”

The statute relating to the place of trial in this case is contained in section 730 of the Revised Statutes, which is as follows:

“SEC. 730. The trial of all offences committed upon the high seas or elsewhere, out of the jurisdiction of any particular State or district, shall be in the district where the offender is found or into which he is first brought.”

[November 20, 1893.]

Mr. Justice FIELD delivered the opinion of the Court.

Several questions of interest arise upon the construction of section 5346 of the Revised Statutes, upon which the indictment in this case was found. The principal one is whether the term “high seas,” as there used, is applicable to the open, unenclosed waters of the Great Lakes, between which the Detroit River is a connecting stream. The term was formerly used, particularly by writers on public law, and generally in official communications between different governments, to designate the open, unenclosed waters of the ocean, or of the British seas, outside of their ports and havens. At one time it was claimed that the ocean, or portions of it, were subject to the exclusive use of particular nations. The Spaniards, in the 16th century, asserted the right to exclude all others from the Pacific Ocean. The Portuguese claimed, with the Spaniards, under the grant of Pope Alexander VI, the exclusive use of the Atlantic Ocean west and south of a designated line. And the English, in the 17th century, claimed the exclusive right to navigate the seas surrounding Great Britain. (Woolsey on Int. Law, sec. 55.)

In the discussions which took place in support of and against these extravagant pretensions the term “high seas” was applied, in the sense stated. It was also used in that sense by English courts and law writers. There was no discussion with them as to the waters of other seas. The public discussions were generally limited to the consideration of the question whether the high seas, that is, the open, unenclosed seas, as above defined, or any portion thereof, could be the property or under the exclusive jurisdiction of any nation, or whether they were open and free to the

navigation of all nations. The inquiry in the English courts was generally limited to the question whether the jurisdiction of the admiralty extended to the waters of bays and harbors, such extension depending upon the fact whether they constituted a part of the high seas.

In his treatise on the rights of the sea, Sir Matthew Hale says: "The sea is either that which lies within the body of a county, or without. That arm or branch of the sea which lies within the *fauces terræ*, where a man may reasonably discern between shore and shore, is, or at least may be, within the body of a county, and, therefore, within the jurisdiction of the sheriff or coroner. That part of the sea which lies not within the body of a county is called the main sea or ocean." (De Jure Maris, ch. IV.) By the "main sea" Hale here means the same thing expressed by the term "high sea"—"*mare altum*," or "*le haut meer*."

In *Waring v. Clarke*, (5 Howard, 440–452,) this court said that it had been frequently adjudicated in the English common law courts since the restraining statutes of Richard II and Henry IV, "that high seas mean the portion of the sea which washes the open coast." In *United States v. Grush*, (5 Mason, 290,) it was held by Mr. Justice Story, in the United States Circuit Court, that the term "high seas," in its usual sense, expresses the unenclosed ocean or that portion of the sea which is without the *fauces terræ* on the seacoast, in contradistinction to that which is surrounded or enclosed between narrow headlands or promontories. It was the open, unenclosed waters of the ocean, or the open, unenclosed waters of the sea, which constituted the "high seas" in his judgment. There was no distinction made by him between the ocean and the sea, and there was no occasion for any such distinction. The question in issue was whether the alleged offences were committed within a county of Massachusetts on the sea coast, or without it, for in the latter case they were committed upon the high seas and within the statute. It was held that they were committed in the county of Suffolk, and thus were not covered by the statute.

If there were no seas other than the ocean, the term high seas would be limited to the open, unenclosed waters of the ocean. But as there are other seas besides the ocean, there must be high seas other than those of the ocean. A large commerce is conducted on seas other than the ocean and the English seas, and it is equally necessary to distinguish between their open waters and their ports and havens, and to provide for offences on vessels navigating those waters and for collisions between them. The term high seas does not, in either case, indicate any separate and distinct body of water; but only the open waters of the sea or ocean, as distinguished from ports and havens and waters within narrow headlands on the coast. This distinction was observed by Latin writers between the ports and havens of the Mediterranean and its open

waters—the latter being termed the high seas.\* In that sense the term may also be properly used in reference to the open waters of the Baltic and the Black Sea, both of which are inland seas, finding their way to the ocean by a narrow and distant channel. Indeed, wherever there are seas in fact, free to the navigation of all nations and people on their borders, their open waters outside of the portion “surrounded or enclosed between narrow headlands or promontories,” on the coast, as stated by Mr. Justice Story, or “without the body of a county,” as declared by Sir Matthew Hale, are properly characterized as high seas, by whatever name the bodies of water of which they are a part may be designated. Their names do not determine their character. There are, as said above, high seas on the Mediterranean, (meaning outside of the enclosed waters along its coast,) upon which the principal commerce of the ancient world was conducted and its great naval battles fought. To hold that on such seas there are no high seas, within the true meaning of that term, that is, no open, unenclosed waters, free to the navigation of all nations and people on their borders, would be to place upon that term a narrow and contracted meaning. We prefer to use it in its true sense, as applicable to the open, unenclosed waters of all seas, than to adhere to the common meaning of the term two centuries ago when it was generally limited to the open waters of the ocean and of seas surrounding Great Britain, the freedom of which was then the principal subject of discussion. If it be conceded, as we think it must be, that the open, unenclosed waters of the Mediterranean are high seas, that concession is a sufficient answer to the claim that the high seas always denote the open waters of the ocean.

Whether the term is applied to the open waters of the ocean or of a particular sea, in any case, will depend upon the context or circumstances attending its use, which in all cases affect, more or less, the meaning of language. It may be conceded that if a statement is made that a vessel is on the high seas, without any qualification by language or circumstance, it will be generally understood as meaning that the vessel is upon the open waters of one of the oceans of the world. It is true, also, that the ocean is often spoken of by writers on public law as *the sea*, and characteristics are then ascribed to the sea generally which are properly applicable to the ocean alone; as, for instance, that its open waters are the highway of all nations. Still the fact remains that there are other seas than the ocean whose open waters constitute a free highway for navigation to the nations and people residing on their borders, and are not a free highway to other nations and people, except there be free access to those seas by open waters or by conventional arrangements.

---

\*“*Insula portum*

*Efficit objectu laterum: quibus omnis ab alto  
Frangitur, inque sinus scindit sese unda reductos.*”

—*The Æneid, Lib. 1.*



As thus defined, the term would seem to be as applicable to the open waters of the great Northern lakes as it is to the open waters of those bodies usually designated as seas. The Great Lakes possess every essential characteristic of seas. They are of large extent in length and breadth; they are navigable the whole distance in either direction by the largest vessels known to commerce; objects are not distinguishable from the opposite shores; they separate, in many instances, States, and in some instances constitute the boundary between independent nations; and their waters, after passing long distances, debouch into the ocean. The fact that their waters are fresh and not subject to the tides, does not affect their essential character as seas. Many seas are tideless, and the waters of some are saline only in a very slight degree.

The waters of Lake Superior, the most northern of these lakes, after traversing nearly 400 miles, with an average breadth of over 100 miles, and those of Lake Michigan, which extend over 350 miles, with an average breadth of 65 miles, join Lake Huron, and, after flowing about 250 miles, with an average breadth of 70 miles, pass into the river St. Clair; thence through the small lake of St. Clair into the Detroit River; thence into Lake Erie and, by the Niagara River, into Lake Ontario, whence they pass, by the river St. Lawrence, to the ocean, making a total distance of over 2,000 miles. (Ency. Britannica, vol. 21, p. 178.) The area of the Great Lakes, in round numbers, is 100,000 square miles. (Ibid. vol. 14, p. 217.) They are of larger dimensions than many inland seas which are at an equal or greater distance from the ocean. The waters of the Black Sea travel a like distance before they come into contact with the ocean. Their first outlet is through the Bosphorus, which is about 20 miles long and for the greater part of its way less than a mile in width, into the sea of Marmora, and through that to the Dardanelles, which is about forty miles in length and less than four miles in width, and then they find their way through the islands of the Greek Archipelago, up the Mediterranean Sea, past the Straits of Gibraltar to the ocean, a distance, also, of over 2,000 miles.

In the *Genesee Chief case* this court, in considering whether the admiralty jurisdiction of the United States extended to the Great Lakes, and, speaking, through Chief Justice Taney, of the general character of those lakes, said: "These lakes are, in truth, inland seas. Different States border on them on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them between different States and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes been made; and every reason which existed for the grant of admiralty jurisdiction to the general government on the Atlantic seas applies with equal force to the lakes. There is an equal necessity for



the instance and for the prize power of the admiralty court to administer international law, and if the one cannot be established neither can the other." (12 How. 453.)

After using this language, the Chief Justice commented upon the inequality which would exist, in the administration of justice, between the citizens of the States on the lakes, if, on account of the absence of tide water in those lakes, they were not entitled to the remedies afforded by the grant of admiralty jurisdiction of the Constitution, and the citizens of the States bordering on the ocean or upon navigable waters affected by the tides. The court, perceiving that the reason for the exercise of the jurisdiction did not in fact depend upon the tidal character of the waters, but upon their practicable navigability for the purposes of commerce, disregarded the test of tide water prevailing in England as inapplicable to our country with its vast extent of inland waters. Acting upon like considerations in the application of the term "high seas" to the waters of the Great Lakes, which are equally navigable, for the purposes of commerce, in all respects, with the bodies of water usually designated as seas, and are in no respect affected by the tidal or saline character of their waters, we disregard the distinctions made between salt and fresh water seas, which are not essential, and hold that the reason of the statute, in providing for protection against violent assaults on vessels in tidal waters, is no greater but identical with the reason for providing against similar assaults on vessels in navigable waters that are neither tidal nor saline. The statute was intended to extend protection to persons on vessels belonging to citizens of the United States, not only upon the high seas, but in all navigable waters of every kind out of the jurisdiction of any particular State, whether moved by the tides or free from their influence.

The character of these lakes as seas was recognized by this court in the recent *Chicago Lake Front case*, where we said: "These lakes possess all the general characteristics of open seas, except in the freshness of their waters, and in the absence of the ebb and flow of the tide." "In other respects," we added, "they are inland seas, and there is no reason or principle for the assertion of dominion and sovereignty over and ownership by the State of lands covered by tide waters that is not equally applicable to its ownership of and dominion and sovereignty over lands covered by the fresh waters of these lakes." (*Illinois Central R. R. Co. v. Illinois*, 146 U. S. 387-435.)

It is to be observed also that the term "high" in one of its significations is used to denote that which is common, open, and public. Thus every road or way or navigable river which is used freely by the public is a "high" way. So a large body of navigable water other than a river, which is of an extent beyond the measurement of one's unaided vision, and is open and unconfined, and not under the exclusive control of any one nation

or people, but is the free highway of adjoining nations or people, must fall under the definition of "high seas" within the meaning of the statute. We may as appropriately designate the open, unenclosed waters of the lakes as the high seas of the lakes, as to designate similar waters of the ocean as the high seas of the ocean, or similar waters of the Mediterranean as the high seas of the Mediterranean.

The language of section 5346, immediately following the term "high seas," declaring the penalty for violent assaults when committed on board of a vessel in any arm of the sea or in any river, haven, creek, basin, or bay, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, equally as when committed on board of a vessel on the high seas, lends force to the construction given to that term. The language used must be read in conjunction with that term, and as referring to navigable waters out of the jurisdiction of any particular State, but connecting with the high seas mentioned. The Detroit River, upon which was the steamer Alaska at the time the assault was committed, connects the waters of Lake Huron (with which, as stated above, the waters of Lake Superior and Lake Michigan join) with the waters of Lake Erie, and separates the Dominion of Canada from the United States, constituting the boundary between them, the dividing line running nearly midway between its banks, as established by commissioners, pursuant to the treaty between the two countries. (8 Stat. 276.) The river is about 22 miles in length and from one to three miles in width, and is navigable at all seasons of the year by vessels of the largest size. The number of vessels passing through it each year is immense. Between the years 1880 and 1892, inclusive, they averaged from thirty-one to forty thousand a year, having a tonnage varying from sixteen to twenty-four millions.\* In

---

\* The following statement, furnished by Colonel O. M. Poe, of the Engineer Corps, shows the traffic through Detroit River for the years indicated:

---

Year.	Number of Vessels.	Registered Tonnage.	Year.	Number of Vessels.	Registered Tonnage.
1880 .....	40,521	20,235,249	1886 .....	38,261	18,968,065
1881 .....	35,888	17,572,240	1887 .....	38,125	18,864,250
1882 .....	35,199	17,872,182	1888 .....	31,404	19,099,060
1883 .....	40,385	17,695,174	1889 .....	32,415	19,646,000
1884 .....	38,742	18,045,949	1890 .....	35,640	21,684,000
1885 .....	34,921	16,777,828	1891 .....	34,251	22,160,000
			1892 .....	33,860	24,785,000

---

Colonel Poe adds: "This statement does not include Canadian vessels, a large number of which use this channel, nor does it include any vessels not clearing from the various custom-houses. Were these included a considerably greater showing could be made. They are not included because the statistics cannot be obtained."

traversing the river they are constantly passing from the territorial jurisdiction of the one nation to that of the other. All of them, however, so far as transactions had on board are concerned, are deemed to be within the country of their owners. Constructively they constitute a part of the territory of the nation to which the owners belong. Whilst they are on the navigable waters of the river they are within the admiralty jurisdiction of that country. This jurisdiction is not changed by the fact that each of the neighboring nations may in some cases assert its own authority over persons on such vessels in relation to acts committed by them within its territorial limits. In what cases jurisdiction by each country will be thus asserted and to what extent, it is not necessary to inquire, for no question on that point is presented for our consideration. The general rule is that the country to which the vessel belongs will exercise jurisdiction over all matters affecting the vessel or those belonging to her, without interference of the local government, unless they involve its peace, dignity or tranquility, in which case it may assert its authority. (*Wildenhus's case*, 120 U. S. 12; Halleck on International Law, Ch. VII, Sec. 26, p. 172.) The admiralty jurisdiction of the country of the owners of the steamer upon which the offence charged was committed is not denied. They being citizens of the United States, and the steamer being upon navigable waters, it is deemed to be within the admiralty jurisdiction of the United States. It was, therefore, perfectly competent for Congress to enact that parties on board committing an assault with a dangerous weapon should be punished when brought within the jurisdiction of the District Court of the United States. But it will hardly be claimed that Congress by the legislation in question intended that violent assaults committed upon persons on vessels owned by citizens of the United States in the Detroit River, without the jurisdiction of any particular State, should be punished, and that similar offences upon persons on vessels of like owners upon the adjoining lakes should be unprovided for. If the law can be deemed applicable to offences committed on vessels in any navigable river, haven, creek, basin, or bay, connecting with the lakes, out of the jurisdiction of any particular State, it would not be reasonable to suppose that Congress intended that no remedy should be afforded for similar offences committed on vessels upon the lakes, to which the vessels on the river, in almost all instances, are directed, and upon whose waters they are to be chiefly engaged. The more reasonable inference is that Congress intended to include the open, unenclosed waters of the lakes under the designation of high seas. The term, in the eye of reason, is applicable to the open, unenclosed portion of all large bodies of navigable waters, whose extent cannot be measured by one's vision, and the navigation of which is free to all nations and people on their borders, by whatever names those bodies may be locally designated. In some countries small lakes are called seas,



as in the case of the Sea of Galilee, in Palestine. In other countries large bodies of water, greater than many bodies denominated seas, are called lakes, gulfs, or basins. The nomenclature, however, does not change the real character of either, nor should it affect our construction of terms properly applicable to the waters of either. By giving to the term "high seas" the construction indicated, there is consistency and sense in the whole statute, but there is neither if it be disregarded. If the term applies to the open, unenclosed waters of the lakes, the application of the legislation to the case under indictment cannot be questioned, for the Detroit River is a water connecting such high seas, and all that portion which is north of the boundary line between the United States and Canada is without the jurisdiction of any State of the Union. But if they be considered as not thus applying, it is difficult to give any force to the rest of the statute without supposing that Congress intended to provide against violence on board of vessels in navigable rivers, havens, creeks, basins, and bays, without the jurisdiction of any particular State, and intentionally omitted the much more important provision for like violence and disturbances on vessels upon the Great Lakes. All vessels in any navigable river, haven, creek, basin, or bay of the lakes, whether within or without the jurisdiction of any particular State, would some time find their way upon the waters of the lakes; and it is not a reasonable inference that Congress intended that the law should apply to offences only on a limited portion of the route over which the vessels were expected to pass, and that no provision should be made for such offences over a much greater distance on the lakes.

Congress in thus designating the open, unenclosed portion of large bodies of water, extending beyond one's vision, naturally used the same term to indicate it as was used with reference to similar portions of the ocean or of bodies which had been designated as seas. When Congress, in 1790, first used that term the existence of the Great Lakes was known; they had been visited by great numbers of persons in trading with the neighboring Indians, and their immense extent and character were generally understood. Much more accurate was this knowledge when the act of 1825 was passed, (4 Stat. 115,) and when the provisions of section 5346 were re-enacted in the Revised Statutes in 1874. In all these cases, when Congress provided for the punishment of violence on board of vessels, it must have intended that the provision should extend to vessels on those waters the same as to vessels on seas, technically so called. There were no bodies of water in the United States to any portion of which the term "high seas" were applicable if not to the open, unenclosed waters of the Great Lakes. It does not seem reasonable to suppose that Congress intended to confine its legislation to the high seas of the ocean, and to its navigable rivers, havens, creeks, basins, and bays, without the jurisdic-



tion of any State, and to make no provision for offences on those vast bodies of inland waters of the United States. There are vessels of every description on those inland seas now carrying on a commerce greater than the commerce on any other inland seas of the world. And we cannot believe that the Congress of the United States purposely left for a century those who navigated and those who were conveyed in vessels upon those seas without any protection.

The statute under consideration provides that every person who, upon the high seas or in any river connecting with them, as we construe its language, within the admiralty jurisdiction of the United States, and out of the jurisdiction of any particular State, commits, on board of any vessel belonging in whole or in part to the United States, or any citizen thereof, an assault on another with a dangerous weapon or with intent to perpetrate a felony, shall be punished, &c. The Detroit River, from shore to shore, is within the admiralty jurisdiction of the United States, and connects with the open waters of the lakes—high seas, as we hold them to be, within the meaning of the statute. From the boundary line, near its centre, to the Canadian shore it is out of the jurisdiction of the State of Michigan. The case presented is therefore directly within its provisions. The act of Congress of September 4, 1890, (1 Sup. to the Rev. Stat. chap. 874, p. 799,) providing for the punishment of crimes subsequently committed on the Great Lakes, does not, of course, affect the construction of the law previously existing.

We are not unmindful of the fact that it was held by the Supreme Court of Michigan in *People v. Tyler*, (7 Michigan, 161,) that the criminal jurisdiction of the Federal courts did not extend to offences committed upon vessels on the lakes. The judges who rendered that decision were able and distinguished; but that fact, whilst it justly calls for a careful consideration of their reasoning, does not render their conclusion binding or authoritative upon this court. Their opinions show that they did not accept the doctrine extending the admiralty jurisdiction to cases on the lakes and navigable rivers, which is now generally, we might say almost universally, received as sound by the judicial tribunals of the country. It is true, as there stated, that as a general principle the criminal laws of a nation do not operate beyond its territorial limits, and that to give any government, or its judicial tribunals, the right to punish any act or transaction as a crime, it must have occurred within those limits. We accept this doctrine as a general rule, but there are exceptions to it as fully recognized as the doctrine itself. One of those exceptions is that offences committed upon vessels belonging to citizens of the United States, within their admiralty jurisdiction, (that is, within navigable waters,) though out of the territorial limits of the United States, may be judicially considered when the vessel and parties are brought within their territorial

jurisdiction. As we have before stated, a vessel is deemed part of the territory of the country to which she belongs. Upon that subject we quote the language of Mr. Webster, while Secretary of State, in his letter to Lord Ashburton of August, 1842. Speaking, for the government of the United States, he stated with great clearness and force the doctrine which is now recognized by all countries. He said: "It is natural to consider the vessels of a nation as parts of its territory, though at sea, as the state retains its jurisdiction over them; and, according to the commonly received custom, this jurisdiction is preserved over the vessels even in parts of the sea subject to a foreign dominion. This is the doctrine of the law of nations, clearly laid down by writers of received authority, and entirely conformable, as it is supposed, with the practice of modern nations. If a murder be committed on board of an American vessel by one of the crew upon another or upon a passenger, or by a passenger on one of the crew or another passenger, while such vessel is lying in a port within the jurisdiction of a foreign state or sovereignty, the offence is cognizable and punishable by the proper court of the United States in the same manner as if such offence had been committed on board the vessel on the high seas. The law of England is supposed to be the same. It is true that the jurisdiction of a nation over a vessel belonging to it, while lying in the port of another, is not necessarily wholly exclusive. We do not so consider or so assert it. For any unlawful acts done by her while thus lying in port, and for all contracts entered into while there, by her master or owners, she and they must, doubtless, be answerable to the laws of the place. Nor, if her master or crew, while on board in such port, break the peace of the community by the commission of crimes, can exemption be claimed for them. But, nevertheless, the law of nations, as I have stated it, and the statutes of governments founded on that law, as I have referred to them, show that enlightened nations, in modern times, do clearly hold that the jurisdiction and laws of a nation accompany her ships not only over the high seas, but into ports and harbors, or wheresoever else they may be water-borne, for the general purpose of governing and regulating the rights, duties, and obligations of those on board thereof, and that, to the extent of the exercise of this jurisdiction, they are considered as parts of the territory of the nation herself." (Webster's Works, vol. 6, pp. 306, 307.)

We do not accept the doctrine that, because by the treaty between the United States and Great Britain the boundary line between the two countries is run through the center of the lakes, their character as seas is changed, or that the jurisdiction of the United States to regulate vessels belonging to their citizens navigating those waters and to punish offences committed upon such vessels, is in any respect impaired. Whatever effect may be given to the boundary line between the two countries, the juris-

diction of the United States over the vessels of their citizens navigating those waters and the persons on board remains unaffected. The limitation to the jurisdiction by the qualification that the offences punishable are committed on vessels in any arm of the sea, or in any river, haven, creek, basin, or bay "without the jurisdiction of any particular State," which means without the jurisdiction of any State of the Union, does not apply to vessels on the "high seas" of the lakes, but only to vessels on the waters designated as connecting with them. So far as vessels on those seas are concerned, there is no limitation named to the authority of the United States. It is true that lakes, properly so called, that is, bodies of water whose dimensions are capable of measurement by the unaided vision, within the limits of a State, are part of its territory and subject to its jurisdiction, but bodies of water of an extent which cannot be measured by the unaided vision, and which are navigable at all times in all directions, and border on different nations or States or people, and find their outlet in the ocean as in the present case, are seas in fact, however they may be designated. And seas in fact do not cease to be such, and become lakes, because by local custom they may be so called.

In our judgment the District Court of the Eastern District of Michigan had jurisdiction to try the defendant upon the indictment found, and it having been transferred to the Circuit Court, that court had jurisdiction to proceed with the trial, and the demurrer to its jurisdiction should have been overruled. Our opinion, in answer to the certificate, is that the courts of the United States have jurisdiction, under section 5346 of the Revised Statutes, to try a person for an assault, with a dangerous weapon, committed on a vessel belonging to a citizen of the United States, when such vessel is in the Detroit River, out of the jurisdiction of any particular State, and within the territorial limits of the Dominion of Canada; and it will be returned to the Circuit Court of the United States for the Sixth Circuit and Eastern District of Michigan, and it is *So ordered.*















CASES ADJUDGED

IN THE

SUPREME COURT OF THE UNITED STATES,

AT

OCTOBER TERM, 1892.

---

IOWA *v.* ILLINOIS.

ORIGINAL.

No. 5. Original. Submitted November 23, 1892. — Decided January 3, 1893.

The true line, in a navigable river between States of the Union which separates the jurisdiction of one from the other, is the middle of the main channel of the river.

In such case the jurisdiction of each State extends to the thread of the stream, that is, to the "mid-channel," and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed.

The boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River.

As the two States both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings cross the Mississippi River, it is ordered that a commission be appointed to ascertain and designate at said places the boundary line between the two States, and that such commission be required to make the proper examination, and to delineate on maps prepared for that purpose, the true line as determined by this court, and report the same to the court for its further action.

THE case is stated in the opinion.

*Mr. John Y. Stone*, Attorney General of the State of Iowa,  
and *Mr. James C. Davis* for complainant.

## Opinion of the Court.

*Mr. George Hunt*, Attorney General of the State of Illinois, for respondent.

MR. JUSTICE FIELD delivered the opinion of the court.

The Mississippi River flows between the States of Iowa and Illinois. It is a navigable stream and constitutes the boundary between the two States; and the controversy between them is as to the position of the line between its banks or shores which separates the jurisdiction of the two States for the purposes of taxation and other purposes of government.

The complainant, the State of Iowa, contends that, for taxation, and for all other purposes, the boundary line is the middle of the main body of the river, taking the middle line between its banks or shores without regard to the "steamboat channel," as it is termed, or deepest part of the stream, and that, to determine the banks or shores, the measurements must be taken when the water is in its natural or ordinary stage, neither swollen by floods nor shrunk by droughts.

On the other hand, the defendant, the State of Illinois, claims that, for taxation and all other purposes, its jurisdiction extends to the middle of "the steamboat channel" of the river, wherever that may be, whether on its east or west bank—the channel upon which commerce on the river by steamboats or other vessels is usually conducted, and which for that reason is sometimes designated as "the channel of commerce."

The State of Iowa in its bill alleges: That prior to and at the time of the treaty between England, France and Spain, in 1763, 3 Jenkinson's Treaties, 177, the territory now comprising the State of Iowa was under the dominion of France, and the territory now comprising the State of Illinois was under the dominion of Great Britain, and that, by the treaty named, the middle of the river Mississippi was made the boundary line between the British and French possessions in North America.

That by the treaty of Paris between Great Britain and the United States, which was concluded September 3, 1783, 3 Jenkinson's Treaties, 410, Art. II, and 8 Stat. 80, the territory comprising the State of Illinois passed to the United States;

## Opinion of the Court.

and that by the purchase of Louisiana from France, under the treaty of April 30, 1803, 8 Stat. 200, the territory comprising the State of Iowa passed to the United States.

That the boundary between the territory comprising the States of Illinois and Iowa remained the middle of the river Mississippi, as fixed by the treaty of 1763.

That by the act of Congress of April 18, 1818, known as the act enabling the people of Illinois to form a State constitution, (3 Stat. 428, c. 67,) the northern and western boundaries of Illinois were defined as follows: Starting in the middle of Lake Michigan, at north latitude forty-two degrees and thirty minutes, "thence west to the middle of the Mississippi River, and thence down along the middle of that river to its confluence with the Ohio River," and that the constitutions of Illinois of 1818, 1848 and 1870 defined the boundaries in the same way.

And the bill further alleges that the State of Illinois and its several municipalities bordering on the Mississippi River claim the right to assess and do assess and tax, as in Illinois, all bridges and other structures in the river from the Illinois shore to the middle of the steamboat channel, or channel of the river usually traversed by steam and other crafts in carrying the commerce of the river, whether such channel is east or west of the middle of the main body or arm of the river; and that they thus assess and tax, as in that State, the bridge of the Keokuk and Hamilton Bridge Company across the river from Keokuk, Iowa, to Island No. Four, in Hancock County, Illinois, from the west shore of the island westward 2462 feet to the east end of the draw of the bridge, and to a point not over 580 feet east from the Iowa shore of the river and 941 feet west of the middle of the main arm or body of the river at that point.

That the steamboat channel, or channel of the river where boats ordinarily run in carrying the commerce of the river, varies from side to side of the river, sometimes being next to the Illinois shore and then next to the Iowa shore, and, at most points in the river, shifting from place to place as the sands of its bed are changed by the current of the water; that at the point of the Keokuk and Hamilton bridge mentioned

## Opinion of the Court.

the river bed is rock and not subject to much change; that at that point, were it not for the bridge, the middle of the steamboat channel would be, and was before the bridge was erected, fully 300 feet east of the east end of the draw in the bridge, or 880 feet from the Iowa shore of the river and 2162 feet from the shore of the river in Illinois on Island No. Four; that at places in the river there are two or more channels equally accessible and useful for navigation by steamboats and other crafts carrying the commerce of the river; and that at the Keokuk and Hamilton bridge the channel used by steamboats is partly artificial, constructed by excavation of rock from the river bed to facilitate the approach to the lock of the United States canal immediately north of the bridge.

That the State of Iowa claims the right to tax all bridges across the river to the middle thereof, and does tax the Keokuk and Hamilton bridge to its middle between the east and west abutments thereof, that is, the west approach and abutment 200 feet and 1096 feet of the bridge proper, thereby treating, for convenience of taxation, the middle of the bridge between abutments as the middle of the river at that point, but which is in fact 225 feet less than one-half the distance across the main arm or body of the river at that point.

That the State of Illinois and its municipalities assess, and tax, as in that State, 716 feet of the bridge actually assessed and taxed in Iowa, and 225 feet of the bridge in addition thereto, located in Iowa but not taxed in that State.

That the Keokuk and Hamilton Bridge Company, owner of the Keokuk and Hamilton bridge, is a corporation of both of said States consolidated, and complains of such double taxation.

That litigation is now pending over such taxation, and is liable at any time to arise over the taxation of any of the other bridges across the river between the said States, now nine in number.

To the end, therefore, that the line between the States may be definitely fixed by the only court having jurisdiction to do so, the complainant prays that this court will take jurisdiction of this bill, and that the State of Illinois be summoned and



## Opinion of the Court.

requested to answer it, waiving such answer being on oath, and that upon the final hearing this court will definitely settle the boundary between the States at the said several bridges.

To this bill the State of Illinois appeared by its attorney general and filed its answer, which denied that the boundary line between the States of Iowa and Illinois is the middle of the Mississippi River, and insisted that it is the middle of the steamboat channel, or channel commonly used by boats in carrying the commerce of the river, whether east or west of the middle of the river. It admitted that the State and its municipalities claimed the right to tax and did tax bridges and other structures in the river to the middle of the steamboat channel or channel of commerce, whether such channel was east or west of the middle of the main body or arm of the river, and did assess and tax the Keokuk and Hamilton bridge to its draw and west of the middle of the main body or arm of the river; and that the steamboat channel or channel of commerce is first near one shore and then near the other, and at other places nearly across the river. But it denied the right of the State of Iowa to tax the bridges mentioned crossing the Mississippi River to any point east of the middle of the steamboat channel, or channel of commerce of that river.

To the answer a replication was filed by the State of Iowa.

At the time of filing its answer the State of Illinois filed also its cross-bill, in which it alleges that there exist nine bridges across the Mississippi River between the States, the most southern of which is the Keokuk and Hamilton Railroad bridge and the most northern, the Dunlieth and Dubuque Bridge Company's railroad bridge.

That for the purposes of taxation the State of Illinois and its municipalities claim the right to assess and tax the respective bridges to the middle of the channel of commerce or steamboat channel, that is, the channel usually used by steamboats and other crafts navigating the river; and that on the part of the State of Iowa and its municipalities it is claimed that each State has the right to assess and tax to the middle of the main arm or body of the river, regardless of where the channel of commerce or steamboat channel may be.

## Opinion of the Court.

That the Supreme Court of Iowa, in the case of *The Dunlieth and Dubuque Bridge Company v. The County of Dubuque*, (55 Iowa, 558,) held that the authorities in Iowa have the right to tax such structures to the middle of the main arm or body of the stream and no further, though at the point where such structure is situated the channel or part of the river followed by steamboat men in navigating the river is far east of the middle of such main body of the stream.

That following the decision in that case, the authorities in Iowa assess and tax such structures to the middle of the main body of the river.

That at the point of the location of the Keokuk and Hamilton bridge the main body of the river, before the construction of the bridge, was between the Iowa shore at Keokuk, Lee County, Iowa, and the west shore of Island No. Four, located in the city of Hamilton, Hancock County, Illinois, a breadth of about 3042 feet; that in constructing the bridge a solid approach is extended from the shore at Keokuk into the river 200 feet, and from the shore on Island No. Four, in Illinois, about 700 feet, and the main body of the river confined between the abutments to the bridge 2192 feet apart, and the bridge consists of the east and west abutments, eleven piers, a draw next to the west or Iowa abutment of 380 feet, and ten spans, together 1812 feet.

That the middle of the steamboat channel, or that part of the river usually traversed by steamboat men in navigating the river, is at or near the east end of the draw or pivot span, about 380 feet from the west abutment and 1812 feet from the east abutment.

That the assessor in Illinois in assessing the bridge values the bridge to the east end of the draw and assesses the same against that part of the bridge in Illinois, and the authorities in Iowa value and assess the bridge to the middle thereof, 1096 feet east from the west abutment, as in the State of Iowa; that thereby 716 feet of the bridge are valued and assessed both in Illinois and Iowa; that litigation is now pending in the lower courts between the bridge company and the authorities over the assessments, and that the same

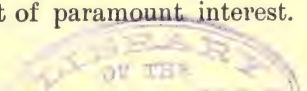
## Opinion of the Court.

trouble and complications are liable to arise over the assessment of any other of the bridges.

To the end, therefore, that the boundary line between the States of Illinois and Iowa at said several bridges may be defined and settled, the State of Illinois prays that the State of Iowa be made defendant to this cross-bill, and required to answer it, and that upon the final hearing the court will define and establish at each of the bridges the boundary lines between the States of Illinois and Iowa, to which points the respective States may tax. To this cross-bill the defendant, the State of Iowa, answered, admitting the existence of nine bridges across the Mississippi River, where it forms the boundary between the States of Illinois and Iowa, and that the State of Illinois and its several municipalities bordering upon the river claim the right to tax said bridges from the Illinois shore of the river to the middle of the channel of commerce or steamboat channel, and that the State of Iowa and its municipalities bordering on the river claim the right to tax and do tax the several bridges to the middle of the main arm or body of the river, regardless of where the channel of commerce or steamboat channel, that is, that part of the river usually traversed by steam or other vessels carrying the commerce of the river, may be. It therefore prays that upon the final hearing the boundary lines between the two States may be established, to which the respective States may tax.

By setting down the case for hearing on the bill, answer and replication, (without taking any testimony,) and on the cross-bill and the answer to it, all the facts alleged in the answer to the original bill, as well as those alleged in the cross-bill and not denied in the answer, are thereby admitted.

When a navigable river constitutes the boundary between two independent States, the line defining the point at which the jurisdiction of the two separates is well established to be the middle of the main channel of the stream. The interest of each State in the navigation of the river admits of no other line. The preservation by each of its equal right in the navigation of the stream is the subject of paramount interest. It





## Opinion of the Court.

is, therefore, laid down in all the recognized treatises on international law of modern times that the middle of the channel of the stream marks the true boundary between the adjoining States up to which each State will on its side exercise jurisdiction. In international law, therefore, and by the usage of European nations, the term "middle of the stream," as applied to a navigable river, is the same as the middle of the channel of such stream, and in that sense the terms are used in the treaty of peace between Great Britain, France and Spain, concluded at Paris in 1763. By the language, "a line drawn along the middle of the river Mississippi from its source to the river Iberville," as there used, is meant along the middle of the channel of the river Mississippi. Thus Wheaton, in his *Elements of International Law*, (8th ed. § 192,) says:

"Where a navigable river forms the boundary of contiguous States, the middle of the channel, or *Thalweg*, is generally taken as the line of separation between the two States, the presumption of law being that the right of navigation is common to both; but this presumption may be destroyed by actual proof of prior occupancy and long undisturbed possession, giving to one of the riparian proprietors the exclusive title to the entire river."

And in § 202, whilst thus stating the rule as to the boundary line of the Mississippi River being the middle of the channel, he states that the channel is remarkably winding, "crossing and recrossing perpetually from one side to the other of the general bed of the river."

Mr. Creasy, in his *First Platform on International Law*, § 231, p. 222, expresses the same doctrine. He says:

"It has been stated that, where a navigable river separates neighboring States, the *Thalweg*, or middle of the navigable channel, forms the line of separation. Formerly a line drawn along the middle of the water, the *medium filum aquæ*, was regarded as the boundary line; and still will be regarded *prima facie* as the boundary line, except as to those parts of the river as to which it can be proved that the vessels which navigate those parts keep their course habitually along some



## Opinion of the Court.

channel different from the *medium filum*. When this is the case, the middle of the channel of traffic is now considered to be the line of demarcation."

Mr. Creasy also refers to the language of Dr. Twiss on the same subject, who observes that "Grotius and Vattel speak of *the middle of the river* as the line of demarcation between two jurisdictions, but modern publicists and statesmen prefer the more accurate and more equitable boundary of the navigable Midchannel. If there be more than one channel of a river, the deepest channel is the Midchannel for the purposes of territorial demarcation; and the boundary line will be the line drawn along the surface of the stream corresponding to the line of deepest depression in its bed. . . . The islands on either side of the Midchannel are regarded as appendages to either bank; and if they have once been taken possession of by the nation to whose bank they are appendant, a change in the Midchannel of the river will not operate to deprive that nation of its possession, although the water-frontier line will follow the change of the Midchannel."

Halleck in his Treatise on International Law, c. 6, § 23, is to the same effect. He says: "Where the river not only separates the conterminous States, but also their territorial jurisdictions, the *thalweg*, or middle channel, forms the line of separation through the bays and estuaries through which the waters of the river flow into the sea. As a general rule, this line runs through the middle of the deepest channel, although it may divide the river and its estuaries into two very unequal parts. But the deeper channel may be less suited, or totally unfit for the purposes of navigation, in which case the dividing line would be in the middle of the one which is best suited and ordinarily used for that object."

Woolsey in his International Law, § 58, repeats the same doctrine and says: "Where a navigable river forms the boundary between two States, both are presumed to have free use of it, and the dividing line will run in the middle of the channel, unless the contrary is shown by long occupancy or agreement of the parties. If a river changes its bed, the line through the old channel continues, but the equitable right to the free

## Opinion of the Court.

use of the stream seems to belong, as before, to the State whose territory the river has forsaken."

The middle of the channel of a navigable river between independent States is taken as the true boundary line from the obvious reason that the right of navigation is presumed to be common to both in the absence of a special convention between the neighboring States, or long use of a different line equivalent to such a convention.

Phillimore, in his Commentaries on International Law, in the chapter upon acquisitions, (c. xii,) speaks of decisions upon the law of property as incident to neighborhood proceeding upon the principle that "midchannel" is the line of demarcation between the neighbors. (Vol. 1, 239.)

The reason and necessity of the rule of international law as to the midchannel being the true boundary line of a navigable river separating independent States may not be as cogent in this country, where neighboring States are under the same general government, as in Europe, yet the same rule will be held to obtain unless changed by statute or usage of so great a length of time as to have acquired the force of law.

As we have stated, in international law and by the usage of European nations, the terms "middle of the stream" and "midchannel" of a navigable river are synonymous and interchangeably used. The enabling act of April 18, 1818, (3 Stat. 428, c. 67,) under which Illinois adopted a constitution and became a State and was admitted into the Union, made *the middle of the Mississippi River* the western boundary of the State. The enabling act of March 6, 1820, (3 Stat. c. 22, § 2, p. 545,) under which Missouri became a State and was admitted into the Union, made the middle of *the main channel of the Mississippi River* the eastern boundary, so far as its boundary was conterminous with the western boundary of Illinois. The enabling act of August 6, 1846, (9 Stat. 56, c. 89,) under which Wisconsin adopted a constitution and became a State and was admitted into the Union, gives the western boundary of that State, after reaching the river St. Croix, as follows: "Thence down the main channel of said river to the Mississippi, thence down the centre of the main

## Opinion of the Court.

channel of that" (Mississippi) "river to the northwest corner of the State of Illinois." The northwest corner of the State of Illinois must therefore be in the middle of the main channel of the river which forms a portion of its western boundary. It is very evident that these terms, "middle of the Mississippi River," and "middle of the main channel of the Mississippi River," and "the centre of the main channel of that river," as thus used, are synonymous. It is not at all likely that the Congress of the United States intended that those terms, as applied to the Mississippi River separating Illinois and Iowa, should have a different meaning when applied to the Mississippi River separating Illinois from Missouri or a different meaning when used as descriptive of a portion of the western boundary of Wisconsin. They were evidently used as signifying the same thing.

The question involved in this case has been elaborately considered, both by the Supreme Court of Iowa and the Supreme Court of Illinois, in cases relating to the assessment and taxation of bridges crossing the Mississippi River, as to the point to which the jurisdiction of each State for taxation extends, and they differed in their conclusions. In *Dunlieth and Dubuque Bridge Company v. County of Dubuque*, 55 Iowa, 558, 565, the Supreme Court of Iowa, after observing that the act of Congress admitting Iowa into the Union and the constitution of Iowa in its preamble declare that the eastern boundary of the State shall be "the middle of the main channel of Mississippi River," proceeds to inquire what line is understood by those words, "middle of the main channel." The defendant maintained that the deep water of the stream used in the navigation of the river was meant, while the plaintiff insisted that the words described the bed in which the stream of the river flows; that is, the bed over which the water flows from bank to bank. The court thought that the words, when applied to rivers generally, without the purpose of describing their currents or navigable characters, always bore the latter signification, observing that this was their primary meaning, and was of opinion that they were used in that sense in the act of Congress admitting the State into the



## Opinion of the Court.

Union, and in the constitution of Iowa. In support of this view the court referred to the changing character of the currents of the river followed by vessels, caused by the shifting nature of the sand bars found in the river. "The course of navigation," it said, "which follows what boatmen call the channel, is extremely sinuous, and often changing, and is unknown except to experienced navigators. On the other hand, the bed of the main river, designated by the word channel, used in its primary sense, is the great body of water flowing down the stream; it is broad and well defined by islands or the main shore. It cannot be possible that Congress and the people of the State, in describing its boundary, used the word channel to describe the sinuous, obscure and changing line of navigation, rather than the broad and distinctly defined bed of the main river. The centre of this river bed channel may be readily determined, while the centre of the navigable channel often could not be known with certainty. The first is a fit boundary line of a State; the second cannot be."

In *Buttenuth v. St. Louis Bridge Co.*, 123 Illinois, 535, 548, the Supreme Court of Illinois reached a different conclusion after an elaborate consideration of the same question. That was a case where an alleged over-estimate was made of a bridge crossing the Mississippi River at St. Louis, and the question discussed was, how far did the jurisdiction of Illinois extend over the river? After observing that when a river is a boundary between States, as is the Mississippi between Illinois and Missouri, it is the main—the permanent—river which constitutes the boundary, and not that part which flows in seasons of high water and is dry at others, the court proceeds, treating the Mississippi River as a common boundary between the States of Illinois and Missouri, to inquire the meaning of the term, "middle of the Mississippi River," used in the enabling act of Congress and in the constitution, defining the boundaries of the State of Illinois. It answers the inquiry by observing that the word "channel" is used as indicating "the space within which ships can and usually do pass," and says: "It is apprehended it is in this sense the expressions 'middle



## Opinion of the Court.

of the river,' 'middle of the main channel,' 'midchannel,' 'middle thread of the channel,' are used in enabling acts of Congress and in state constitutions establishing state boundaries. It is the free navigation of the river — when such river constitutes a common boundary, that part on which boats can and do pass, sometimes called 'nature's pathway' — that States demand shall be secured to them. When a river, navigable in fact, is taken or agreed upon as the boundary between two nations or States, the utility of the main channel, or, what is the same thing, the navigable part of the river, is too great to admit a supposition that either State intended to surrender to the State or nation occupying the opposite shore the whole of the principal channel or highway for vessels and thus debar its own vessels the right of passing to and fro for purposes of defence or commerce. That would be to surrender all, or at least the most valuable part, of such river boundary, for the purposes of commerce or other purposes deemed of great value, to independent States or nations."

The opinions in both of these cases are able and present, in the strongest terms, the different views as to the line of jurisdiction between neighboring States, separated by a navigable stream; but we are of opinion that the controlling consideration in this matter is that which preserves to each State equality in the right of navigation in the river. We therefore hold, in accordance with this view, that the true line in navigable rivers between the States of the Union which separates the jurisdiction of one from the other is the middle of the main channel of the river. Thus the jurisdiction of each State extends to the thread of the stream, that is, to the "mid-channel," and, if there be several channels, to the middle of the principal one, or, rather, the one usually followed.

It is therefore ordered, adjudged and declared that the boundary line between the State of Iowa and the State of Illinois is the middle of the main navigable channel of the Mississippi River. And, as the counsel of the two States both desire that this boundary line be established at the places where the several bridges mentioned in the pleadings — nine in number — cross the Mississippi River, it is further ordered

## Syllabus.

that a commission be appointed to ascertain and designate at said places the boundary line between the two States, such commission, consisting of three competent persons, to be named by the court upon suggestion of counsel, and be required to make the proper examination and to delineate on maps prepared for that purpose the true line as determined by this court, and report the same to the court for its further action.











Counsel for Parties.

## VIRGINIA v. TENNESSEE.

ORIGINAL.

No. 3. Original. Argued March 8, 9, 1893. — Decided April 3, 1893.

The boundary line between the States of Virginia and Tennessee, which was ascertained and adjusted by commissioners appointed by and on behalf of each State, and marked upon the surface of the ground between the summit of White Top Mountain and the top of the Cumberland Mountains, having been established and confirmed by the State of Virginia in January, 1803, and by the State of Tennessee in November, 1803, and having been recognized and acquiesced in by both parties for a long course of years, and having been treated by Congress as the true boundary between the two States, in its districting them for judicial and revenue purposes, and in its action touching the territory in which Federal elections were to be held and for which Federal appointments were to be made, was a line established under an agreement or compact between the two States, to which the consent of Congress was constitutionally given; and, as so established, it takes effect as a definition of the true boundary, even if it be found to vary somewhat from the line established in the original grants.

The history of the Royal Grants, and of the Colonial and State Legislation upon this subject reviewed.

An agreement or compact as to boundaries may be made between two States, and the requisite consent of Congress may be given to it subsequently, or may be implied from subsequent action of Congress itself towards the two States; and when such agreement or compact is thus made, and is thus assented to, it is valid.

What "an agreement or compact" between two States of the Union is, and what "the consent of Congress" to such agreement or compact is, within the meaning of Article I of the Constitution, considered and explained.

A boundary line between States or Provinces which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive.

THE case is stated in the opinion.

*Mr. R. Taylor Scott*, Attorney General of the State of Virginia, *Mr. William F. Rhea* and *Mr. Rufus A. Ayers*, for the State of Virginia.

*Mr. George W. Pickle*, Attorney General of the State of Tennessee, (with whom was *Mr. N. M. Taylor*, *Mr. H. H. Haynes*, *Mr. Thomas Curtin* and *Mr. C. J. St. John* on the

## Opinion of the Court.

brief,) *Mr. Abram L. Demoss* and *Mr. A. S. Colyar* for the State of Tennessee.

MR. JUSTICE FIELD delivered the opinion of the court.

This is a suit to establish by judicial decree the true boundary line between the States of Virginia and Tennessee. It embraces a controversy of which this court has original jurisdiction, and in this respect the judicial department of our government is distinguished from the judicial department of any other country, drawing to itself by the ordinary modes of peaceful procedure the settlement of questions as to boundaries and consequent rights of soil and jurisdiction between States, possessed, for purposes of internal government, of the powers of independent communities, which otherwise might be the fruitful cause of prolonged and harassing conflicts.

The State of Virginia, as the complainant, summoning her sister State, Tennessee, to the bar of this court—a jurisdiction to which the latter promptly yields—sets forth in her bill the sources of her title to the territory embraced within her limits, and also of the title to the territory embraced by Tennessee.

The claim of Virginia is that by the charters of the English sovereigns, under which the colonies of Virginia and North Carolina were formed, the boundary line between them was intended and declared to be a line running due west from a point on the Atlantic Ocean on the parallel of latitude thirty-six degrees and thirty minutes north, and that the State of Tennessee, having been created out of the territory formerly constituting a part of North Carolina, the same boundary line continued between her and Virginia. And the contention of Virginia is that the boundary line claimed by Tennessee does not follow this parallel of latitude but varies from it by running too far north, so as to unjustly include a strip of land about one hundred and thirteen miles in length and varying from two to eight miles in width, over which she asserts and unlawfully exercises sovereign jurisdiction.

On the other hand, the claim of Tennessee is that the



## Opinion of the Court.

boundary line, as declared in the English charters, between the colonies of Virginia and North Carolina was run and established by commissioners appointed by Virginia and Tennessee after they became States of the Union, by Virginia in 1800 and by Tennessee in 1801, and that the line they established was subsequently approved in 1803 by the legislative action of both States, and has been recognized and acted upon as the true and real boundary between them ever since, until the commencement of this suit, a period of over eighty-five years. And the contention of Tennessee is that the line thus established and acted upon is not open to contestation as to its correctness at this day, but is to be held and adjudged to be the real and true boundary line between the States, even though some deviations from the line of the parallel of latitude thirty-six degrees and thirty minutes north may have been made by the commissioners in the measurement and demarcation of the line.

In order to clearly understand and appreciate the force and effect to be accorded to the respective claims and contentions of the parties, a brief history of preceding measures should be given, with reference to the charters and legislation under which they were taken.

On the 23d of May, 1609, James the First of England, by letters patent, reciting previous letters, gave to Robert, Earl of Salisbury, Thomas, Earl of Suffolk, and divers other persons associated with them, a charter which organized them into a corporation by the name of The Treasurer and Company of Adventurers and Planters of the city of London, for the first colony of Virginia, and granted to them all those lands and territories, lying "in that part of America called Virginia, from the point of land called Cape or Point Comfort, along the sea coast to the northward 200 miles, and from the said point of Cape Comfort along the sea coast to the southward 200 miles, and all that space and circuit of land lying from the sea coast of the precinct aforesaid up into the land throughout, from sea to sea, west and northwest"; and, "also all the islands lying within 100 miles along the coast of both seas of the precinct aforesaid."

## Opinion of the Court.

On the 24th of March, 1663, Charles the Second of England granted to Edward, Earl of Clarendon, and others of his subjects, all that territory within his dominion of America "extending from the north end of the island called Lucke Island, which lyeth in the Southern Virginia seas and within six and thirty degrees of the northern latitude, and to the west as far as the South Seas, and so southerly as far as the river Mathias, which bordereth upon the coast of Florida, and within one and thirty degrees of northern latitude, and so west in a direct line as far as the South Seas aforesaid," and gave them full authority to organize and govern the territory granted under the name of the Province of Carolina.

On the 30th of May, 1665, Charles the Second granted to the above proprietors of Carolina a charter, confirming the previous grant, and enlarging the same so as to include the following-described territory: All that province and territory within America, "extending north and eastward as far as the north end of Currituck River or inlet, upon a straight westerly line to Wyonoke Creek, which lies within or about the degrees of thirty-six and thirty minutes northern latitude; and so west in a direct line as far as the South Seas; and south and westward as far as the degrees of twenty-nine inclusive of northern latitude, and so west in a direct line as far as the South Seas."

The northern and southern settlements of Carolina were separated from each other by nearly three hundred miles, and numerous Indians resided upon the intervening territory, and though the whole province belonged to the same proprietors, the legislation of the settlements was by different assemblies, acting at times under different governors. Early in 1700 the northern part of the province was sometimes called the colony of North Carolina, though the province was not divided by the crown into North and South Carolina until 1732. (Story's Commentaries on the Constitution, sec. 137.) Previously to this division the settlements on the borders of Virginia, and of what was called the colony of North Carolina, had largely increased, and disputes and altercations frequently occurred between the settlers, growing out of the

## Opinion of the Court.

unlocated boundary between the provinces. Virginians were charged with taking up lands, under titles of the crown, south of the proper limits of their province, and Carolinians were charged with taking up lands which belonged to the crown with warrants from the proprietors. The troubles arising from this source were the occasion of much disturbance to the communities, and various attempts were made by parties in authority in the two provinces to remove the cause of them. Previously to January, 1711, commissioners were appointed on the part of Virginia and North Carolina to run the boundary line between them, and proclamations were made forbidding surveys of the grounds until that line within the disputed limits should be marked. But these efforts for the settlement of the difficulties were unavailing.

In January, 1711, commissioners were again appointed, but failed for want of the requisite means to accomplish their intended object.

In 1728 an attempt to settle the difficulties was renewed, but, as on previous occasions, it failed. The commissioners of the colonies met, but they could not agree at what place to fix the latitude thirty-six degrees thirty minutes north, nor upon the place called Wyonoke, and they broke up without doing anything. The governors of North Carolina and Virginia then entered into a convention upon the subject of the boundary between the two provinces, and transmitted it to England for approval. The king and council approved of it, and so did the lords and proprietors, and returned it to the governors to be executed. The agreement was as follows:

“That from the mouth of Carrituck River, setting the compass on the north shore thereof, a due west line shall be run and fairly marked, and if it happens to cut Chowan River between the mouth of Nottaway River and Wiccacon Creek, then the same direct course shall be continued towards the mountains, and be ever deemed the dividing line between Virginia and Carolina. But if the said west line cuts Chowan River to the southward of Wiccacon Creek, then from that point of intersection the bounds shall be allowed to continue up the middle of Chowan River to the middle of the



## Opinion of the Court.

entrance into said Wiccacon Creek, and from thence a due west line shall divide the two governments. That if said west line cuts Blackwater River to the northward of Nottaway River, then from the point of intersection the bounds shall be allowed to be continued down the middle of said Blackwater to the middle of the entrance into said Nottaway River, and from thence a due west line shall divide the two governments.

“That if a due west line shall be found to pass through islands or cut out small slips of land, which might much more conveniently be included in one province or other, by natural water bounds, in such case the persons appointed for running the line shall have the power to settle natural bounds, provided the commissioners on both sides agree thereto, and that all variations from the west line be punctually noted on the premises or plats, which they shall return to be put upon the record of both governments.”

Commissioners were appointed by Virginia and North Carolina to carry this agreement into effect. They met at Currituck Inlet in March, 1728. The variation of the compass was then found to be three degrees one minute and two seconds west, nearly, and the latitude thirty-six degrees thirty-one minutes. The dividing line between the provinces struck Blackwater one hundred and seventy-six poles above the mouth of Nottaway. The variation of the compass at the mouth of Nottaway was two degrees thirty minutes. The line was afterward extended to Steep Rock Creek, 320 miles from the coast, by commissioners Joshua Fry and Peter Jefferson, on the part of Virginia, and Daniel Weldon and William Churton, on the part of North Carolina.

In 1778 and 1779 Virginia and North Carolina having become by their separation in 1776 from the British crown independent States, again took up the question of the boundary between them, and appointed commissioners to extend and complete the line from the point at which the previous commissioners, Fry and Jefferson and others, had ended their work on Steep Rock Creek, to Tennessee River. The commissioners undertook the work with which they were charged, but they could not find the line on Steep Rock Creek, owing,



## Opinion of the Court.

as they supposed, to the large amount of timber which had decayed since it was marked. The report of their labors was signed only by the Virginia commissioners. Their report was, in substance, that after running the line as far as Carter's Valley, forty-five miles west of Steep Rock Creek, the commissioners of Carolina conceived the idea that the line was farther south than it ought to be, and, on trial, it appeared that there was a slight variation of the needle, which the Virginia commissioners thought arose from their proximity to some iron ore; that various expedients to harmonize the action of the commissioners were unavailing, and the Carolina commissioners, agreeing that they were more than two miles too far south of the proper latitude, measured off that distance directly north, and ran the line eastwardly from that place, superintended by two of the Carolina and one of the Virginia commissioners, while from the same place it was continued westwardly, superintended by the others, for the sake of expediting the business. The Virginia commissioners subsequently became satisfied that the first line run by them was correct and they, therefore, continued it from Carter's Valley, where it had been left, westward to Tennessee River. The North Carolina commissioners carried their line as far as Cumberland Mountains, protesting against the line run by the Virginia commissioners.

This was in 1779 and 1780. The line adopted by the Virginia commissioners was known as the Walker line and the line adopted by the commissioners of North Carolina was known as the Henderson line. Walker's line was approved by the legislature of Virginia in 1791, but it never received the approval of the legislature of Tennessee. Previously to the appointment of these commissioners, and on the 6th of May, 1776, the State of Virginia, in a general convention, with that generous public spirit which on all occasions since has characterized her conduct in the disposition of her claims to territory under different charters from the English government, had declared that the territories within the charters erecting the colonies of Maryland, Pennsylvania, North Carolina and South Carolina were thereby ceded and forever confirmed to the people of those colonies respectively. On the

## Opinion of the Court.

25th of February, 1790, North Carolina ceded to the United States the territory which afterwards became the State of Tennessee, (2 Charters and Constitutions, 1664,) and which was admitted into the Union on the 1st of June, 1796. 1 Stat. 491, c. 47. Subsequently, the States of Virginia and Tennessee both took steps for the final settlement of the controversy as to the boundary between them. On the 10th of January, 1800, the house of delegates of the general assembly of Virginia adopted the following resolution: "Whereas it is represented to the present general assembly that the people living between what are called Walker's and Henderson's lines, so far as the same run between the State of Tennessee and this State, do not consider themselves under either the jurisdiction of that or this State, and, therefore, refuse the payment of any taxes to either of said States, or to the collectors of either for the general government, because the State of North Carolina, on the 25th of February, 1790, ceded the said State of Tennessee, then called the Southwestern Territory, to the government of the United States; and, therefore, the act entitled 'An act concerning the southern boundary of this State,' passed on the 7th of December, 1791, in this legislature, to establish the line commonly called Walker's line, as the boundary between North Carolina and this State, could only bind the State of North Carolina as far as her territorial limits extended on the line of this State, and could not bind the said Southwestern Territory, which had previously been conveyed, as aforesaid; and

"Whereas, Since the said cession, the general government hath erected the said Southwestern Territory into an independent State, by their act, June 1st, 1796, whereby it has become the duty of the said State of Tennessee and of this State to settle all differences between them with respect to the said boundary line:

"*Resolved, therefore,* That the executive be authorized and requested to appoint three commissioners, whose duty it shall be to meet commissioners to be appointed by the State of Tennessee, to settle and adjust all differences concerning the said boundary line, and to establish the one or the other of the

## Opinion of the Court.

said lines as the case may be, or to run *any other line* which may be agreed on, for settling the same; and that the executive be also requested to transmit a copy of this resolution to the executive authority of the State of Tennessee.”

On the 13th of January, 1800, this resolution was agreed to by the Senate.

On the 13th day of November, 1801, the general assembly of Tennessee passed an act on the same subject, Laws of Tennessee, 1801, c. 29, the first section of which is these words :

“*Be it enacted by the general assembly of the State of Tennessee*, That the governor for the time being is hereby authorized and required, as soon as may be convenient after the passing of this act, to appoint three commissioners on the part of this State, one of whom shall be a mathematician capable of taking latitude, who, when so appointed, are hereby authorized and empowered, or a majority of them, to act in conjunction with such commissioners as are or may be appointed by the State of Virginia to settle and designate a true line between the aforesaid States.”

The 2d section is as follows :

“*And whereas*, It may be difficult for this legislature to ascertain with precision what powers ought of right to be delegated to the said commissioners ; therefore, .

“*Be it enacted*, That the governor is hereby authorized and required from time to time to issue such power to the commissioners, as he may deem proper, for the purpose of carrying into effect the object intended by this act, consistent with the true interest of the State.”

On the 22d day of January, 1803, a report having been made by the commissioners, which is copied into the act, the legislature of Virginia ratified what had been done in the following act :

“Whereas, The commissioners appointed to ascertain and adjust the boundary line between this State and the State of Tennessee, in conformity to the resolution passed by the legislature of this State for that purpose, have proceeded to the execution of that business, and made a report thereof in the words following, to wit :



## Opinion of the Court.

“‘The commissioners for ascertaining and adjusting the boundary line between the States of Virginia and Tennessee appointed pursuant to public authority on the part of each, namely: General Joseph Martin, Creed Taylor and Peter Johnson, for the former, and Moses Fisk, General John Sevier and General George Rutledge, for the latter, having met at the place previously appointed for that purpose, and not uniting, from the general result of their astronomical observations, to establish either of the former lines called Walker’s and Henderson’s, *unanimously agreed*, in order to *end all controversy* respecting the subject, to run a due west line equally distant from both, beginning on the summit of the mountain generally known by the name of White Top Mountain, where the northeastern corner of Tennessee terminates, to the top of Cumberland Mountain, where the southwestern corner of Virginia terminates, which is hereby declared to be the true boundary line between the said States, and has been accordingly run by Brice Martin and Nathan B. Markland; the surveyors duly appointed for that purpose, and marked under the directions of the said commissioners, as will more at large appear by the report of the said surveyors, hereto annexed, and bearing equal date herewith.

“‘2. And the said commissioners do further unanimously agree to recommend to their respective States, that individuals having claims or titles to lands on either side of the said line, as now fixed and agreed on, and between the lines aforesaid, shall not in consequence thereof in anywise be prejudiced or affected thereby; and that the legislatures of their respective States should pass mutual laws to render all such claims or titles secure to the owners thereof.

“‘3. And the said commissioners do further agree unanimously to recommend to their States respectively that reciprocal laws should be passed confirming the acts of all public officers, whether magistrates, sheriffs, coroners, surveyors or constables, between the said lines, which would have been legal in either of the said States had no difference of opinion existed about the true boundary line.

“‘4. This agreement shall be of no effect until ratified by



## Opinion of the Court.

the legislatures of the States aforesaid. Given under our hands and seals at William Robertson's, near Cumberland Gap, December the eighth, eighteen hundred and two. (Dec. 8th, 1802.)

" 'JOS. MARTIN.	[L. s.]
" 'CREED TAYLOR.	[L. s.]
" 'PETER JOHNSON.	[L. s.]
" 'JOHN SEVIER.	[L. s.]
" 'MOSES FISK.	[L. s.]
" 'GEORGE RUTLEDGE.	[L. s.]'

"5. And whereas, Brice Martin and Nathan B. Markland, the surveyors duly appointed to run and mark the said line, have granted their certificate of the execution of their duties, which certificate is in the words following, to wit: 'The undersigned surveyors, having been fully appointed to run the boundary line between the States of Virginia and Tennessee, as directed by the commissioners for that purpose, have agreeably to their orders, run the same, beginning on the summit of the White Top Mountain at the termination of the north-eastern corner of the State of Tennessee, a due west course to the top of the Cumberland Mountains, where the southwestern corner of Virginia terminates, keeping at an equal distance from the lines called Walker's and Henderson's, and have had the new line run as aforesaid marked with five chops in the form of a diamond, as directed by the said commissioners. Given under our hands and seals, this eighth day of December, eighteen hundred and two. (8th December, 1802.)

" 'B. MARTIN.	[L. s.]
" 'NAT. B. MARKLAND.	[L. s.]'

"And it is deemed proper and expedient that the said boundary line, so fixed and ascertained as aforesaid, should be established and confirmed on the part of this Commonwealth—

"6. *Be it therefore enacted by the General Assembly of the Commonwealth of Virginia,* That said boundary line between this State and the State of Tennessee, as laid down, fixed and ascertained by the said commissioners above named, in their

## Opinion of the Court.

said report above recited, shall be and is hereby *fully and absolutely*, to all intents and purposes whatsoever, *ratified, established and confirmed* on the part of this Commonwealth, as the *true, certain and real boundary line* between the said States.

“7. All claims or titles derived from the government of North Carolina or Tennessee, which said lands by the adjustment and establishment of the line aforesaid, have fallen into this State, shall remain as secure to the owners thereof as if derived from the government of Virginia, and shall not be in anywise prejudiced or affected in consequence of the establishment of the said line.

“8. The acts of all public officers, whether magistrates, sheriffs, coroners, surveyors or constables, heretofore done or performed in that portion of the territory between the lines called Walker’s and Henderson’s lines, which has fallen into this State by the adjustment of the present line, and which would have been legal if done or performed in the States of North Carolina or Tennessee, are hereby recognized and confirmed.

“9. This act shall commence and be in force from and after the passing of a like law on the part of the State of Tennessee.” Laws of Va. 1802–1803, c. 39.

And on the 3d of November, 1803, Tennessee passed the following ratifying act:

“Whereas, the commissioners appointed to settle and designate the true boundary between this State and the State of Virginia, in conformity to the act passed by the legislature of this State for the purpose, on the thirteenth day of November, one thousand eight hundred and one, have proceeded to the execution of said business, and made a report thereof in the words following, to wit”:

(Here follows the report named in the Virginia act:)

“And it is deemed proper and expedient that the said boundary line, so fixed and ascertained as aforesaid, should be established and confirmed on the part of this State —

“1. *Be it enacted by the General Assembly of the State of Tennessee*, That the said boundary line between this State

## Opinion of the Court.

and the State of Virginia as laid down, fixed and ascertained by the said commissioners above named in their said report above recited, shall be and is hereby fully and absolutely to all intents and purposes whatsoever, *ratified, established and confirmed* on the part of this State as the *true, certain and real* boundary line between the said States.

“2. *Be it enacted*, That all claims or titles to lands derived from the government of Virginia, which said lands, by the adjustment and establishment of the line aforesaid have fallen into this State, shall remain as secure to the owners thereof as if derived from the government of North Carolina or Tennessee, and shall not be in anywise prejudiced or affected in consequence of the establishment of the said line.

“3. *Be it enacted*, That the acts of all officers, whether magistrates, sheriffs, coroners, surveyors or constables, heretofore done or performed in that portion of territory between the lines called Walker's and Henderson's lines, which has fallen into this State by the adjustment of the present line, and which would have been legal if done or performed in the State of Virginia, are hereby recognized and confirmed.” Laws of Tennessee, 1803, c. 58.

The line thus run was accepted by both States as a satisfactory settlement of a controversy which had, under their governments and that of the colonies which preceded them, lasted for nearly a century. As seen from the acts recited, both States through their legislatures declared in the most solemn and authoritative manner that it was fully and absolutely ratified, established and confirmed as the true, certain and real boundary line between them; and this declaration could not have been more significant had it added, in express terms, what was plainly implied, that it should never be departed from by the government of either, but be respected, maintained and enforced by the governments of both. All modes of legislative action which followed it indicated its approval. Each State asserted jurisdiction on its side up to the line designated, and recognized the lawful jurisdiction of the adjoining State up to the line on the opposite side. Both States levied taxes on the lands on their respective sides and

## Opinion of the Court.

granted franchises to the people resident thereon. The people on the south side voted at state and municipal elections for representatives and officers of Tennessee, and the people on the north side at such state and municipal elections voted for representatives and officers of Virginia. The courts of the two States exercised jurisdiction, civil and criminal, on their respective sides, and enforced their process up to that line; and the legislation of Congress in the designation of districts for the jurisdiction of courts, and in prescribing limits for collection districts and for purposes of election, made no exception to the boundary as thus established. Act of July 1, 1862, 12 Stat. 432, 433, c. 119.

The line was marked with great care by the commissioners of the States, with five chops on the trees in the form of a diamond, at such intervals between them as they deemed sufficient to identify and trace the line. Not a whisper of fraud or misconduct is made by either side against the commissioners, for the conclusions they reached and the line they established. It is true that in the year 1856, fifty-four years after the line was thus settled, Virginia, reciting that the line as marked by the commissioners in 1802 had, by lapse of time, the improvement of the country, natural waste and destruction and other causes, become indistinct, uncertain and to some extent unknown, so that many inconveniences and difficulties occurred between the citizens of the respective States and in the administration of their governments, passed an act for the appointment of commissioners, to meet commissioners to be appointed by Tennessee, to again run and mark said line, — not to run and mark a new line, — and provided that where there was no growing timber on any part of the line by which it might be plainly marked, if the old marks were gone, the commissioners should cause monuments of stone to be permanently planted on the line, at least one at every five miles or less, where it might seem best to the commissioners to do so, that the line might be readily identified for its entire length. The whole purpose of the act, as is evident on its face was, not to change the old boundary line, but only to more perfectly identify it. Tennessee responded to that invi-



## Opinion of the Court.

tation, and appointed commissioners to act with those from Virginia. The commissioners together re-run and re-marked the line as it was established in 1802, and planted such additional monuments as were deemed necessary, and they reported to their respective legislatures • that they had “accurately run, re-marked and measured the old line of 1802, with all its offsets and irregularities as shown in the surveyor’s report” therein incorporated and on the accompanying map therewith submitted. The legislature of Tennessee approved of the action of the commissioners, but Virginia withheld her approval and called for a new appointment of commissioners to re-run and re-mark the line, which was refused by Tennessee as unnecessary. No complaint as to the correctness of the line run and established in 1802 was made by Virginia until within a recent period. She now by her bill asks that the compact entered into between her and the State of Tennessee, as set forth in the act of the general assembly of Virginia of January 22, 1803, and which became operative by similar action of the legislature of Tennessee on the 3d of November following, be declared null and void, as having been entered into between the States without the consent of Congress, and prays that this court will establish the true boundary line between those States due east and west, in latitude 36° and 30′ north, in accordance with what it alleges to be the ancient chartered rights of that Commonwealth and the laws creating the State of Tennessee and admitting it into the Union.

The Constitution provides that “no State shall, without the consent of Congress, lay any duty of tonnage, keep troops or ships of war in time of peace, enter into any agreement or compact with another State, or with a foreign power, or engage in war, unless actually invaded, or in such imminent danger as will not admit of delay.”

Is the agreement, made without the consent of Congress, between Virginia and Tennessee, to appoint commissioners to run and mark the boundary line between them, within the prohibition of this clause? The terms “agreement” or “compact” taken by themselves are sufficiently comprehensive to

## Opinion of the Court.

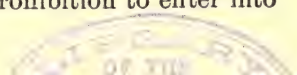
embrace all forms of stipulation, written or verbal; and relating to all kinds of subjects; to those to which the United States can have no possible objection or have any interest in interfering with, as well as to those which may tend to increase and build up the political influence of the contracting States, so as to encroach upon or impair the supremacy of the United States or interfere with their rightful management of particular subjects placed under their entire control.

There are many matters upon which different States may agree that can in no respect concern the United States. If, for instance, Virginia should come into possession and ownership of a small parcel of land in New York which the latter State might desire to acquire as a site for a public building, it would hardly be deemed essential for the latter State to obtain the consent of Congress before it could make a valid agreement with Virginia for the purchase of the land. If Massachusetts, in forwarding its exhibits to the World's Fair at Chicago, should desire to transport them a part of the distance over the Erie Canal, it would hardly be deemed essential for that State to obtain the consent of Congress before it could contract with New York for the transportation of the exhibits through that State in that way. If the bordering line of two States should cross some malarious and disease-producing district, there could be no possible reason, on any conceivable public grounds, to obtain the consent of Congress for the bordering States to agree to unite in draining the district, and thus removing the cause of disease. So in case of threatened invasion of cholera, plague, or other causes of sickness and death, it would be the height of absurdity to hold that the threatened States could not unite in providing means to prevent and repel the invasion of the pestilence, without obtaining the consent of Congress, which might not be at the time in session. If, then, the terms "compact" or "agreement" in the Constitution do not apply to every possible compact or agreement between one State and another, for the validity of which the consent of Congress must be obtained, to what compacts or agreements does the Constitution apply?

## Opinion of the Court.

We can only reply by looking at the object of the constitutional provision, and construing the terms "agreement" and "compact" by reference to it. It is a familiar rule in the construction of terms to apply to them the meaning naturally attaching to them from their context. *Noscitur a sociis* is a rule of construction applicable to all written instruments. Where any particular word is obscure or of doubtful meaning, taken by itself, its obscurity or doubt may be removed by reference to associated words. And the meaning of a term may be enlarged or restrained by reference to the object of the whole clause in which it is used.

Looking at the clause in which the terms "compact" or "agreement" appear, it is evident that the prohibition is directed to the formation of any combination tending to the increase of political power in the States, which may encroach upon or interfere with the just supremacy of the United States. Story, in his Commentaries, (§ 1403,) referring to a previous part of the same section of the Constitution in which the clause in question appears, observes that its language "may be more plausibly interpreted from the terms used, 'treaty, alliance or confederation,' and upon the ground that the sense of each is best known by its association (*noscitur a sociis*) to apply to treaties of a political character; such as treaties of alliance for purposes of peace and war; and treaties of confederation, in which the parties are leagued for mutual government, political coöperation, and the exercise of political sovereignty, and treaties of cession of sovereignty, or conferring internal political jurisdiction, or external political dependence, or general commercial privileges"; and that "the latter clause, 'compacts and agreements,' might then very properly apply to such as regarded what might be deemed mere private rights of sovereignty; such as questions of boundary; interests in land situate in the territory of each other, and other internal regulations for the mutual comfort and convenience of States bordering on each other." And he adds: "In such cases the consent of Congress may be properly required, in order to check any infringement of the rights of the national government; and, at the same time, a total prohibition to enter into





## Opinion of the Court.

any compact or agreement might be attended with permanent inconvenience or public mischief."

Compacts or agreements — and we do not perceive any difference in the meaning, except that the word "compact" is generally used with reference to more formal and serious engagements than is usually implied in the term "agreement" — cover all stipulations affecting the conduct or claims of the parties. The mere selection of parties to run and designate the boundary line between two States, or to designate what line should be run, of itself imports no agreement to accept the line run by them, and such action of itself does not come within the prohibition. Nor does a legislative declaration, following such line, that it is correct, and shall thereafter be deemed the true and established line, import by itself a contract or agreement with the adjoining State. It is a legislative declaration which the State and individuals, affected by the recognized boundary line, may invoke against the State as an admission, but not as a compact or agreement. The legislative declaration will take the form of an agreement or compact when it recites some consideration for it from the other party affected by it, for example, as made upon a similar declaration of the border or contracting State. The mutual declarations may then be reasonably treated as made upon mutual considerations. The compact or agreement will then be within the prohibition of the Constitution or without it, according as the establishment of the boundary line may lead or not to the increase of the political power or influence of the States affected, and thus encroach or not upon the full and free exercise of Federal authority. If the boundary established is so run as to cut off an important and valuable portion of a State, the political power of the State enlarged would be affected by the settlement of the boundary; and to an agreement\* for the running of such a boundary, or rather for its adoption afterwards, the consent of Congress may well be required. But the running of a boundary may have no effect upon the political influence of either State; it may simply serve to mark and define that which actually existed before, but was undefined and unmarked. In that case the agreement for the running of the line, or its actual survey,



## Opinion of the Court.

would in no respect displace the relation of either of the States to the general government. There was, therefore, no compact or agreement between the States in this case which required, for its validity, the consent of Congress, within the meaning of the Constitution, until they had passed upon the report of the commissioners, ratified their action, and mutually declared the boundary established by them to be the true and real boundary between the States. Such ratification was mutually made by each State in consideration of the ratification of the other.

The Constitution does not state when the consent of Congress shall be given, whether it shall precede or may follow the compact made, or whether it shall be express or may be implied. In many cases the consent will usually precede the compact or agreement, as where it is to lay a duty of tonnage, to keep troops or ships of war in time of peace, or to engage in war. But where the agreement relates to a matter which could not well be considered until its nature is fully developed, it is not perceived why the consent may not be subsequently given. Story says that the consent may be implied, and is always to be implied when Congress adopts the particular act by sanctioning its objects and aiding in enforcing them; and observes that where a State is admitted into the Union, notoriously upon a compact made between it and the State of which it previously composed a part, there the act of Congress, admitting such State into the Union, is an implied consent to the terms of the compact. Knowledge by Congress of the boundaries of a State, and of its political subdivisions, may reasonably be presumed, as much of its legislation is affected by them, such as relates to the territorial jurisdiction of the courts of the United States, the extent of their collection districts, and of districts in which process, civil and criminal, of their courts may be served and enforced.

In the present case, the consent of Congress could not have preceded the execution of the compact, for, until the line was run, it could not be known where it would lie and whether or not it would receive the approval of the States. The preliminary agreement was not to accept a line run, whatever it

## Opinion of the Court.

might be, but to receive from the commissioners designated a report as to the line which might be run and established by them. After its consideration each State was free to take such action as it might judge expedient upon their report. The approval by Congress of the compact entered into between the States upon their ratification of the action of their commissioners is fairly implied from its subsequent legislation and proceedings. The line established was treated by that body as the true boundary between the States in the assignment of territory north of it as a portion of districts set apart for judicial and revenue purposes in Virginia, and as included in territory in which federal elections were to be held, and for which appointments were to be made by federal authority in that State, and in the assignment of territory south of it as a portion of districts set apart for judicial and revenue purposes in Tennessee, and as included in territory in which federal elections were to be held, and for which federal appointments were to be made for that State. Such use of the territory on different sides of the boundary designated, in a single instance would not, perhaps, be considered as absolute proof of the assent or approval of Congress to the boundary line; but the exercise of jurisdiction by Congress over the country as a part of Tennessee on one side, and as a part of Virginia on the other, for a long succession of years, without question or dispute from any quarter, furnishes as conclusive proof of assent to it by that body as can usually be obtained from its most formal proceedings.

Independently of any effect due to the compact as such, a boundary line between States or Provinces, as between private persons, which has been run out, located and marked upon the earth, and afterwards recognized and acquiesced in by the parties for a long course of years, is conclusive, even if it be ascertained that it varies somewhat from the courses given in the original grant; and the line so established takes effect, not as an alienation of territory, but as a definition of the true and ancient boundary. Lord Hardwicke, in *Penn v. Lord Baltimore*, 1 Vesey Sen. 444, 448; *Boyd v. Graves*, 4 Wheat. 513; *Rhode Island v. Massachusetts*, 12 Pet. 657,

## Opinion of the Court.

734; *United States v. Stone*, 2 Wall. 525, 537; *Kellogg v. Smith*, 7 Cush. 375, 382; *Chenery v. Waltham*, 8 Cush. 327; *Hunt on Boundaries*, (3d. ed.) 306.

As said by this court in the recent case of the *State of Indiana v. Kentucky*, (136 U. S. 479, 510,) "it is a principle of public law, universally recognized, that long acquiescence in the possession of territory, and in the exercise of dominion and sovereignty over it, is conclusive of the nation's title and rightful authority." In the case of *Rhode Island v. Massachusetts*, 4 How. 591, 639, this court, speaking of the long possession of Massachusetts, and the delays in alleging any mistake in the action of the commissioners of the colonies said: "Surely this, connected with the lapse of time, must remove all doubts as to the right of the respondent under the agreements of 1711 and 1718. No human transactions are unaffected by time. Its influence is seen on all things subject to change. And this is peculiarly the case in regard to matters which rest in memory, and which consequently fade with the lapse of time and fall with the lives of individuals. For the security of rights, whether of States or individuals, long possession under a claim of title is protected. And there is no controversy in which this great principle may be invoked with greater justice and propriety than in a case of disputed boundary."

Vattel, in his *Law of Nations*, speaking on this subject, says: "The tranquillity of the people, the safety of States, the happiness of the human race do not allow that the possessions, empire, and other rights of nations should remain uncertain, subject to dispute and ever ready to occasion bloody wars. Between nations, therefore, it becomes necessary to admit prescription founded on length of time as a valid and incontestable title."<sup>1</sup> (Book II, c. 11, § 149.) And

---

<sup>1</sup> La tranquillité des peuples, le salut des États, le bonheur du genre humain, ne souffrent point que les possessions, l'empire, et les autres droits des Nations, demeurent incertains, sujets à contestation, et toujours en état d'exciter des guerres sanglantes. Il faut donc admettre entre les peuples la prescription fondée sur un long espace de temps, comme un moyen solide et incontestable.



## Opinion of the Court.

Wheaton, in his International Law, says: "The writers on natural law have questioned how far that peculiar species of presumption, arising from the lapse of time, which is called *prescription*, is justly applicable as between nation and nation; but the constant and approved practice of nations shows that by whatever name it be called, the uninterrupted possession of territory or other property for a certain length of time by one State excludes the claim of every other in the same manner as, by the law of nature and the municipal code of every civilized nation, a similar possession by an individual excludes the claim of every other person to the article of property in question." (Part II, c. 4, § 164.)

There are also moral considerations which should prevent any disturbance of long recognized boundary lines; considerations springing from regard to the natural sentiments and affections which grow up for places on which persons have long resided; the attachments to country, to home and to family, on which is based all that is dearest and most valuable in life.

Notwithstanding the legislative declaration of Virginia in 1803 that the line marked by the joint commissioners of the two States was ratified as the true and real boundary between them, and the repeated reaffirmation of the same declaration in her laws since that date, notably in the Code of 1858, in the Code of 1860 and in the Code of 1887; notwithstanding that the State has in various modes attested to the correctness of the boundary — by solemn affirmation in terms, by legislation, in the administration of its government, in the levy of taxes and the election of officers, and in its acquiescence for over eighty-five years, embracing nearly the lives of three generations, she now, by her bill, seeks to throw aside the obligation from her legislative declaration, because, as alleged, not made upon the express consent, in terms, of Congress, although such consent has been indicated by long acquiescence in the assumption of the validity of the proceedings resulting in the establishment of the boundary, and to have a new boundary line between Virginia and Tennessee established running due east and west on latitude thirty-six degrees thirty minutes north.



## Opinion of the Court.

But to this position there is, in addition to what has already been said, a conclusive answer in the language of this court in *Poole v. Fleeger*, 11 Pet. 185, 209. In that case Mr. Justice Story, after observing that "it is a part of the general right of sovereignty belonging to independent nations to establish and fix the disputed boundaries between their respective territories ; and the boundaries so established and fixed by compact between nations become conclusive upon all the subjects and citizens thereof, and bind their rights, and are to be treated to all intents and purposes, as the true and real boundary," adds: "This is a doctrine universally recognized in the law and practice of nations. It is a right equally belonging to the States of this Union, unless it has been surrendered under the Constitution of the United States. So far from there being any pretence of such a general surrender of the right, it is expressly recognized by the Constitution, and guarded in its exercise by a single limitation or restriction, requiring the consent of Congress." The Constitution in imposing this limitation plainly admits that with such consent a compact as to boundaries may be made between two States ; and it follows that when thus made it has full validity, and all the terms and conditions of it are equally obligatory upon the citizens of both States.

The compact in this case having received the consent of Congress, though not in express terms, yet impliedly, and subsequently, which is equally effective, became obligatory and binding upon all the citizens of both Virginia and Tennessee. Nor is it any objection that there may have been errors in the demarcation of the line which the States thus by their compact sanctioned. After such compacts have been adhered to for years neither party can be absolved from them upon showing errors, mistakes or misapprehension of their terms, or in the line established ; and this is a complete and perfect answer to the complainant's position in this case.

It may also be stated that if the work of the joint commissioners, under the laws of 1800 and 1801, approved by the legislative action of both States in 1803, could be left out of consideration and a new line run, it would not follow that the

## Opinion of the Court.

parallel of latitude thirty-six degrees thirty minutes north would be strictly followed. The charter of Charles the Second designates the northern boundary line of the province of North Carolina as extending from Currituck River or inlet upon a straight westerly line to Wyonoke Creek, which lies *within or about thirty-six degrees thirty minutes north latitude*, from which it is evident that that parallel was only to be the general direction of the line, not one to be strictly and always followed without any variations from it. The purpose of the declaration in the charter of Charles the Second was only that the northern boundary line was to be run in the neighborhood of that parallel. The condition of the country at the time the charter was granted — 1665 — would have made the running of a boundary line strictly on that parallel a matter of great difficulty, if not impossible. Nor did the needs of grantor or chartered proprietors call for any such strict adherence to the parallel of latitude designated. That neither party expected it, is evident from the agreement made between the governors of Virginia and North Carolina as to running the boundary line between them, and sent to England for approval by the king and council. That agreement provided that, if the west line run should be found to pass through islands or to cut out small slips of land, which might much more conveniently be included in one province than the other by natural water bounds, in such case the persons appointed to run the line should have power to settle natural water bounds, provided, the commissioners on both sides agreed, and that all variations from the west line should be noted on the premises or on plats which they should return, to be put on record by both governors. A possible, indeed, a probable, variation from the line of the parallel of latitude, or the straight line designated, was contemplated by both Virginia and Tennessee. With full knowledge of the line actually designated, and of the ancient charter to Carolina, and of the description in the Constitution of Tennessee, in appointing the joint commissioners, they provided that they should settle and adjust all differences concerning the boundary line, and establish either the Walker or Henderson line, or run *any other line which might be agreed on*

## Opinion of the Court.

*for settling the same*; and that means any line run and measured with or without deviations from time to time from a straight line, or the line of latitude mentioned as might in their judgment be most convenient as the proper boundary for both States. It was made with numerous variations from a straight line, and from the line of the designated parallel of latitude for the convenience of the two States, and, with the full knowledge of both, was ratified, established and confirmed as the true, certain and real boundary line between them. And then, fifty-six years afterwards, in consequence of the line thus marked becoming indistinct, it was re-run and re-marked, by new commissioners under the directions of the statutes of 1800 and 1801, in strict conformity with the old line. The compact of the two States, establishing the line adopted by their commissioners, and to which Congress impliedly assented after its execution, is binding upon both States and their citizens. Neither can be heard at this date to say that it was entered into upon any misapprehension of facts. No treaty, as said by this court, has been held void on the ground of misapprehension of facts, by either or both of the parties. *Rhode Island v. Massachusetts*, 4 How. 591, 635.

The general testimony, with hardly a dissent, is that the old line of 1802 can be readily traced throughout its whole length; and, moreover, that line has been recognized by all the residents near it, except those in the triangle at Denton's Valley and in another district of small dimensions, in which it is stated that the people have voted as citizens of Virginia and have recognized themselves as citizens of that State. That fact, however, cannot affect the potency and conclusiveness of the compact between the States by which the line was established in 1803. The small number of citizens whose expectations will be disappointed by being included in Tennessee are secured in all their rights of property by provisions of the compact passed especially for the protection of their claims.

Some observations were made, on the argument of the case, upon the propriety and necessity, if the line established in 1803 be sustained, of having it re-run and re-marked, so as hereafter to be more readily identified and traced. But a careful exam-



## Opinion of the Court.

ination of the testimony of the numerous witnesses in the case, most of them residing in the neighborhood of the boundary line, as to the marks and identification of the line originally established in 1802, and re-run and re-marked in 1859, satisfies us that no new marking of the line is required for its ready identification. The commissioners appointed under the act of Virginia of 1856, and under the act of Tennessee of 1858, found all the old marks upon the trees in the forest through which the line established ran, in the form of a diamond; and whenever they were indistinct, or, in the judgment of the commissioners, too far removed from each other, new marks were made upon the trees, or if no trees were found at particular places to be marked, monuments in stone were planted. Besides this, the State of Virginia does not ask that the line agreed upon in 1803 shall be re-run or re-marked, but prays that a new boundary line be run on the line of  $36^{\circ} 30'$ . Tennessee does not ask that the line of 1803 be re-run or re-marked. Nevertheless, under the prayer of Virginia for general relief, there can be no objection to the restoration of any marks which may be found to have been obliterated or become indistinct upon the line as herein defined.

Our judgment, therefore, is that the boundary line established by the States of Virginia and Tennessee by the compact of 1803 is the true boundary between them, and that on a proper application, based upon a showing that any marks for the identification of that line have been obliterated or have become indistinct, an order may be made, at any time during the present term, for the restoration of such marks without any change of the line.

*A decree will, therefore, be entered declaring and adjudging that the boundary line established between the States of Virginia and Tennessee by the compact of 1803 is the real, certain and true boundary between the said States, and that the prayer of the complainant to have the said compact set aside and annulled, and to have a new boundary line run between them on the parallel of  $36^{\circ} 30'$  north latitude should be and is denied at the cost of the complainant; and it is so ordered.*



---

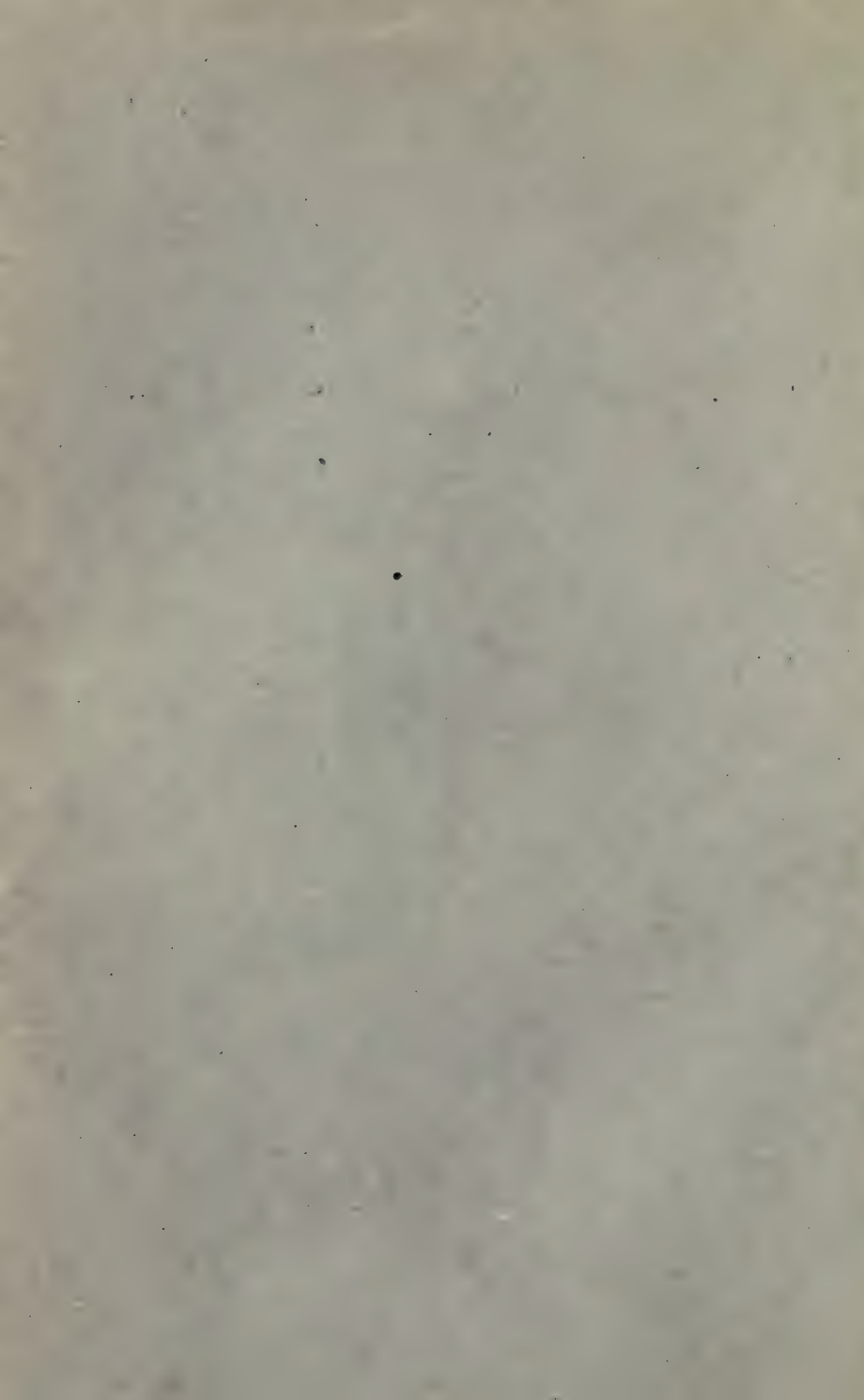
---

*When a Federal Court and a State Court may each take jurisdiction of the same subject matter and parties, the tribunal whose jurisdiction first attaches will retain it to the final determination of the controversy, either to the entire exclusion of the other tribunal, or to its exclusion so far as to render its decision subordinate.*

---

---





When a Federal Court and a State Court may each take jurisdiction of the same subject matter and parties, the tribunal whose jurisdiction first attaches will retain it to the final determination of the controversy, either to the entire exclusion of the other tribunal, or to its exclusion so far as to render its decision subordinate.

---

## **Opinion**

OF

The Circuit Court of the United States

FOR THE

Northern District of California.

Delivered at San Francisco,

September 3, 1888,

BY

MR. JUSTICE FIELD.

---





# In the Circuit Court

OF THE

UNITED STATES

Ninth Circuit, Northern District of California.

---

FREDERICK W. SHARON,  
As Executor, *Complainant,*

*vs.*

DAVID S. TERRY and SARAH  
ALTHEA TERRY, his Wife,  
*Defendants.*

---

*Bill of Revivor  
in Equity.*

---

FRANCIS G. NEWLANDS,  
As Trustee, et al.,  
*Complainants,*

*vs.*

DAVID S. TERRY and SARAH  
ALTHEA TERRY, his Wife,  
*Defendants.*

---

*Bill in Equity, in  
the Nature of a Bill of  
Revivor and Supple-  
ment, and to carry De-  
cree into Execution.*

---

Before FIELD, Circuit Justice.

SAWYER, Circuit Judge, and

SABIN, District Judge.

1. Upon proceedings to revive a suit in equity abated by the death of the complainant, for the purpose of executing a final decree

which has been rendered in such suit, no objections can be taken which could have been urged when the original bill was pending, except want of jurisdiction apparent upon the record. An attack upon a judgment or decree in a proceeding to revive it is a collateral attack, and can only avail when there is a want of jurisdiction, either of the parties or of the subject matter.

2. The circuit courts of the United States have jurisdiction to cancel a written contract of marriage on the ground of its forgery. Such contract if genuine and followed by the requisite consummation, imposes upon the husband from its date the obligation to support the wife, and confers upon the wife certain rights in his property, and such obligation and rights measure the sum or value of the matter in dispute in a suit to cancel such written contract within the meaning of the Acts of Congress requiring a certain value to such matter in order to give the circuit courts of the United States jurisdiction. Where the controversy is not respecting the amount or value in dispute, such amount or value when necessary to the jurisdiction may be shown by the evidence produced in the case, or by affidavits filed when the question of jurisdiction is raised.
3. The right of action to cancel a marriage contract, which, if genuine and followed by the requisite consummation as mentioned above, would create rights in the property of the alleged husband, survives to his executor or administrator.
4. The transfer of the property of the plaintiff in a suit to cancel a forged marriage contract while such suit is pending does not abate it, if the plaintiff retain a right during his life to claim the rents and profits thereof, and the purchasers or beneficiaries under such transfer are entitled to the benefit of the decree rendered in such suit cancelling the contract, to protect the property from claims made under or by virtue of it.
5. Where the jurisdiction of the circuit court of the United States has attached in a suit brought by a citizen of a State other than that in which the Court is held, the right of the plaintiff to prosecute his suit in such court to a final determination there cannot be arrested, defeated or impaired by any subsequent action or proceeding of the defendant respecting the same subject matter in a state court.
6. Where different courts may entertain jurisdiction of the same subject, the court which first obtains jurisdiction will, with some well-recognized exceptions, retain it to the end of the controversy, either to the entire exclusion of the other, or to the exclusion so far as to render the latter's decision subordinat

to that of the court first obtaining jurisdiction, and it is immaterial which court renders the first judgment or decree.

7. The exceptions to the rule that priority of jurisdiction controls priority of decision are, first, where the same plaintiff has asked in different suits a determination of the same matter; and, second, where the cases are upon contracts or obligations, which from their nature are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist.
8. The decree of a circuit court of the United States cancelling a forged marriage contract, may be used to stay the enforcement of judgments for property rights recovered upon such contract in a subsequent suit in a state court.
9. Section 720 of the Revised Statutes, prohibiting injunctions by any court of the United States to stay proceedings in a state court, does not apply where the federal court has first obtained jurisdiction of the subject matter of the proceedings and of the parties in the state court. This section must be construed in connection with Section 716 of the Revised Statutes, which provides that the federal courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law.

## Statement of the Cases.

These cases are brought to revive and carry into execution a final decree of this court in the suit of *William Sharon vs. Sarah Althea Hill*, entered as of the 29th day of September, 1885. On the 3d day of October, 1883, William Sharon, a citizen of the State of Nevada, since deceased, instituted in the circuit court of the United States for the District of California, a suit in equity against Sarah Althea Hill, now Sarah Althea Terry, to obtain its decree adjudging a certain paper in her possession, purporting to be a declaration of marriage between them, to be a forgery, and enjoining its use and directing its cancellation.

In his complaint, after stating his citizenship in Nevada, and the citizenship of the defendant in California, he set forth in substance this: That he was and had been for some years an unmarried man; that formerly he was the husband of Maria Ann Sharon, who died in May, 1875; and that he had never been the husband of any other person; that there were two children living, the issue of that marriage, and also grand children, the children of a deceased daughter of the marriage; that he was possessed of a large fortune in real and personal property; was extensively engaged in business enterprises and ventures, and had a wide business and social connection; that, as he was informed, the defendant was an unmarried woman of about thirty years of age, for some time a resident of San Francisco; that within two months then past she had repeatedly and publicly claimed and represented, and then declared and represented that she was his lawful wife; that she falsely and fraudulently pretended that she was duly married to him on the 25th



day of August, 1880, at the city and county of San Francisco; that on that day they had jointly made a declaration of marriage, showing the names, ages and residences of the parties, jointly doing the acts required by Section 75 of the Civil Code of California to constitute a marriage between them, and that thereby they became and were husband and wife according to the law of that State.

The complainant further alleged that these several claims, representations and pretensions, were wholly and maliciously false, and were made by her for the purpose of injuring him in his property, business and social relations; for the purpose of obtaining credit by the use of his name with merchants and others and thereby compelling him to maintain her; and for the purpose of harassing him, and, in case of his death, his heirs and next of kin and legatees, into payment of large sums of money to quiet her false and fraudulent claims and pretensions. He also set forth what he was informed was a copy of the declaration of marriage, and alleged that if she had any such instrument it was "false, forged and counterfeited;" that he never on the day of its date or at any other time made or executed such document or declaration, and never knew or heard of the same until within a month previous to that time, and that the same was null and void as against him, and ought in equity and good conscience to be so declared, and ordered to be delivered up, to be annulled and cancelled.

The complaint concluded with a prayer that it be adjudged and decreed that the said Sarah Althea Hill was not and never had been the wife of the complainant; that he did not make the said joint declaration of marriage, or any marriage between them, and that she be perpetually enjoined and restrained from making said allegations, representations and pretensions of marriage with him; that said contract or joint declaration

of marriage be decreed and adjudged to be "false, fraudulent, forged and counterfeited," and ordered to be delivered up, to be cancelled and annulled, according to the practice of courts of equity in like cases; and that he might have such other and further relief as the nature and justice of the case might require.

The complaint was verified in the usual form by his oath. It was filed, as stated above, October 3, 1883, and on the same day a subpoena was issued thereon, which was personally served by the Marshal on the defendant, at San Francisco, two days afterwards—October 5th.

On the 3d of December following, the defendant appeared in the suit by solicitors, giving her name as Sarah Althea Sharon, and demurred to the complaint on the alleged ground that it did not contain any matter of equity whereon the court could make any decree or give the complainant any relief against her. The demurrer was argued at the ensuing February term in 1884, and overruled, with leave to the defendant to answer by the next rule day on the usual terms. The case as presented was held to be a proper one for equitable relief. "This supposed contract," said the court, "is alleged to be a forgery, and to be fraudulent. It purports to be in writing and to be signed by the parties; and the defendant claims by virtue of it, to be the wife of complainant, and to have an interest in his property, which is alleged to be of the value of several millions of dollars. There is no adequate remedy at law for complainant against the claim set up, under the alleged contract, and no means at law to annul it at the suit of complainant. The defendant can choose her own time for enforcing her claim under the alleged contract, even after the death of the other party. Fraud has always been one of the principal heads of equity jurisdiction."

“The instrument in question is alleged to be a forgery and a fraud. If it is a forgery, it is of course a fraud also. The only parties who appear to have any personal knowledge of the facts, so far as indicated—who personally know anything about this transaction—are the two parties to the alleged fraudulent contract. One is alleged to be many years older than the other, the complainant being alleged to be sixty and defendant twenty-seven years old. The elder, in the ordinary course of nature, is more liable to die, and the contract, in such an event, would be in control of the defendant, without any testimony to defeat the fraud, if fraud there be. The right to several millions of property might be in after years affected and controlled by reason of the alleged fraud. A great wrong and injustice may be thus perpetrated in consequence of it, unless a court of equity can take hold of and cancel it. There is no way by an action at law, that we are aware of, to meet the conditions or effectually dispose of this instrument.” (10 Sawyer, 49, 50.) And again, “If there is no remedy in equity for such a wrong as is charged, then the law is indeed impotent to protect the community against frauds of the most far-reaching and astounding character.” (*Sharon vs. Hill*, 10 Sawyer, 48.)

After the case had been commenced in the circuit court of the United States and process served, the defendant, by the name of Sarah Althea Sharon, commenced an action in one of the superior courts of the city and county of San Francisco against the said William Sharon, alleging in her complaint that they had been married by virtue of the said declaration of marriage—that is, the same contract for the cancellation of which, on the alleged ground of its forgery, the suit in the circuit court of the United States had been commenced—and praying that her said marriage might be declared legal and valid, and then that she might be

divorced from him by reason of certain infidelities to his marriage contract committed by him, which are specially set forth. In that complaint assuming, without stating, what was generally known in the community, that the defendant was a man of large wealth and had a large income, she alleged that when they intermarried he did not have over five millions of dollars, and that his income did not then exceed the sum of thirty thousand dollars a month, but that since such intermarriage they had "by their prudent management of mines, fortunate speculations, manipulations of the stock market, and other business enterprises, accumulated in money and property more than ten millions of dollars (\$10,000,000), so that now the defendant has in his possession or under his control money and property of the value of at least fifteen millions of dollars (\$15,000,000), from which he receives an income of over one hundred thousand dollars per month." She, therefore, further prayed that an account might be taken of their business transactions to ascertain their common property, in order that it might be equitably divided between them.

William Sharon filed an answer to that complaint, denying, among other things, that he was ever married to the said Sarah Althea, and averring that the said alleged declaration of marriage between them, purporting to have been signed by him, was a false and forged document, which he had never signed and never heard of until within sixty days then past.

When the defendant in the circuit court, upon the overruling of her demurrer, was called upon to answer, she set up as a plea in abatement to that suit, the pendency of the action in the superior court of the city and county of San Francisco, upon the theory that as that action, though subsequently commenced, was founded upon the assumed validity of the alleged marriage contract and involved a determination of that



question, and the action after being removed to the federal court had been remanded back to the state court by stipulation of parties, and was then on trial, the circuit court of the United States ought to stay its proceedings in the original suit until the state court had expressed its opinion in reference to the validity of the contract in question, and then accept its judgment as conclusive.

The plea also set up that the circuit court of the United States had no jurisdiction of the case, on the ground that the plaintiff was, and had been for more than three years, a resident and citizen of California. The plaintiff traversed both pleas, and the court held both to be bad—the first because the two suits were not identical, but for different objects, the one proceeding upon an assumed valid contract and asking for a divorce and a division of the community property, and the other seeking a cancellation of the contract for alleged forgery; and because the two suits were pending in courts of different jurisdiction. (*Stanton vs. Embrey*, 93 U. S., 548; *Gordon vs. Gilfoil*, 99 Id., 169, 178.) The second plea as to the citizenship of Sharon was held to be false, no testimony impeaching the allegations of the complaint in that respect having been offered. (10 Sawyer, 394.) These pleas having been overruled, the defendant was allowed thirty days to answer to the merits, and accordingly, on the 30th day of December, 1884, she filed such answer. In the meantime, subsequent to the disposition of the special pleas of the defendant, the superior court of the city and county of San Francisco, had decided the case before it, holding the said declaration or contract of marriage to be a genuine and valid instrument, by virtue of which the parties thereto had become husband and wife.

In her answer, therefore, the defendant not only denied the several allegations of the complaint as to the

citizenship of the plaintiff; as to the plaintiff's never having been the husband of any other person than Maria Ann Sharon; and as to her being an unmarried woman; and that her "claims were made for any other purpose but that of obtaining the recognition and support justly due" to her as wife of the plaintiff; but set up as a separate defense the action of the superior court of the city and county of San Francisco, and its judgment that the said alleged declaration of marriage was a genuine instrument by which the parties were made husband and wife. A supplemental answer averred that the state court had filed its decree and findings reaffirming its adjudication as to the genuineness of that instrument. One of its findings set forth the alleged marriage contract, and added, "which was the only written declaration, contract or agreement of marriage ever entered into between said parties, and at the time of signing said declaration, plaintiff and defendant mutually agreed to take each other, as, and henceforth to be to each other, husband and wife."

To these answers replications were filed, whereupon proofs were taken by the parties, which occupied several months. On the 29th day of September, 1885, the cause was submitted on the pleadings and proofs, after elaborate arguments of counsel. Whilst it was pending before the court undecided, and on November 13th, 1885, the plaintiff William Sharon died. The decree when rendered was therefore entered as of the day when the cause was submitted, in accordance with the usual practice in such cases. By that decree it was ordered and adjudged that the alleged declaration of marriage was not, nor was any part thereof, signed or executed on said 25th day of August, A. D. 1880, or at any time by the plaintiff William Sharon; that it was not his declaration, contract, agreement or other instrument; but was a false, counterfeited, fabricated, forged and fraud-

ulent instrument, and as such was null and void; and that the said instrument, within twenty days after notice of the decree to the defendant, or to her solicitors, should be delivered by her to, and deposited with, the clerk of this court, to be endorsed "cancelled;" and that upon such delivery, the clerk should write across the same "cancelled," by virtue of this decree, and sign his name and affix thereto the seal of this court; and that the document should thereafter remain in the custody of the clerk, subject to the further order of the court. The decree concluded as follows: "And it is further ordered, adjudged and decreed that the respondent herein, Sarah Althea Hill, her heirs, assigns, executors, administrators and all persons claiming any interest thereunder by or through said respondent and her and their agents and attorneys, be, and they and each and all of them are, hereby perpetually enjoined from alleging the genuineness or the validity of said instrument, and from making any use of the same in evidence or otherwise to support any right claimed under it, or making any claim, or setting up any right, interest or claim of any kind, under or by virtue of said instrument or declaration of marriage, either as wife of complainant, or for any interest in property or right of any kind or nature against said complainant, his heirs, executors, administrators or successors in interest, and that complainant recover his costs of suit."

William Sharon left a last will and testament in which he named his son Frederick W. Sharon and his son-in-law Francis G. Newlands as executors. Newlands declined to act, and to Frederick W. Sharon, as sole executor, letters testamentary were issued. As such executor he, on March 12, 1888, filed one of the bills, the titles of which are given above, to have the suit revived in his favor as such executor, so that proceedings may be had for the enforcement of the

decree. He alleges that the suit and proceedings under the decree have abated by the death of Sharon; that the alleged marriage contract, adjudged to be a forgery, has not been surrendered for cancellation as ordered by the decree, and he fears that the said defendant will claim and seek to enforce property rights as the wife of William Sharon by virtue of that written declaration of marriage, under the decree of another court (the superior court of the city and county of San Francisco), essentially founded thereon, which, as he is advised, is wholly subject and subordinate to the decree of this court, contrary to the true intent, meaning and spirit of the perpetual injunction ordered, and in violation thereof. He alleges the marriage of the defendant with David S. Terry, who is joined as a defendant with her, and prays the process of the court to the end that the said suit and proceedings therein may stand revived in his favor and be in the same condition and plight in which they were at the time of the abatement.

On the 4th of November, 1885, William Sharon executed a deed of his property, real and personal, to his son-in-law, Francis G. Newlands, and his son, Frederick W. Sharon, subject to various trusts. Without specifying the details of the said trusts, it may be stated generally that they are designed to secure for some years the protection and management of the property, which is of great value, amounting to several millions of dollars, and its final distribution to the children and grandchildren of the grantor, and to others related by blood or marriage to him. It reserves, however, a power in the grantor to require at any time the trustees to pay over to him "the whole or any part of the net income, rents, issues and profits of said property" remaining after making certain monthly payments to his children and to his son-in-law for his grandchildren. It also re-



serves a power in him to direct a distribution and conveyance of his property at any time during his life to the beneficiaries named, instead of at the periods designated therein. It concludes with a solemn asseveration that the said Sarah Althea Hill was not and never had been his wife; that he never proposed marriage to her, or married her in any form or manner whatever; that the so-called marriage contract and "dear wife" letters introduced by her in evidence in the state Court were forgeries; that all her claims to wifehood were based upon forgeries and perjuries, and he "specially empowers and directs" the trustees "to vigorously contest in every court where a contest can be made" her false claim and pretensions. Frederick W. Sharon has since resigned the duties and powers of said trust, and the execution of the trusts has devolved upon the other trustee named, Francis G. Newlands. And he, as such trustee, and other parties and beneficiaries under the trust deed, on April 14, 1888, filed the other of the bills, the titles of which are given above, which is an original bill in the nature of a bill of revivor and supplement to carry the decree in *Sharon vs. Hill* into execution for their benefit. It sets forth with particularity the proceedings in the suit in the circuit court of the United States, and the decree rendered therein, and its non-execution and the abatement of the suit by the death of Sharon, and the execution and contents of the trust deed; also the commencement and prosecution by said Sarah Althea of the action in the state court claiming to be his wife under the said declaration of marriage, and the proceedings and judgment therein. It avers that the matter in suit in the circuit court exceeded the sum or value of \$500; that the property of Sharon was of the value of five millions of dollars over and above his debts and liabilities; that said Sarah Althea Hill claimed all the rights of a wife under the laws of the State of California in the prop-

erty of the plaintiff, and to a reasonable support from him as her husband, and to a share in the property acquired by him after the date of said declaration of marriage; that such support was of the value of at least five hundred dollars per month, if she was in fact his wife; that she also claimed and asserted a right to one-half of all the property acquired by said William Sharon after the 25th day of August, 1880, and that she is entitled as her share of such property to at least five millions of dollars; that said claim was disputed as false and fraudulent by the said William Sharon, and is now disputed by his successors in interest, and that it was the object of the suit in this court to protect the property and property rights of said William Sharon, and of the complainants as his successors in interest against said claims, which were settled by the decree of this court enjoining her from asserting any property rights either as the wife of complainant, or under or by virtue of said declaration of marriage.

The bill also sets forth that the state court expressly found and adjudged that the declaration of marriage (which the circuit court has held to be a forgery and annulled) was the only written declaration, contract or agreement of marriage ever entered into between the parties, and upon such findings and adjudication rendered its judgment, declaring that Sarah Althea was his wife, and granting her a divorce from such marriage, and awarding her one-half of all the community property accumulated by him after August 25, 1880; and ordering an accounting to ascertain the community property; that the defendant, now Sarah Althea Terry, is threatening and endeavoring for the first time to proceed with an accounting under her judgment of divorce, for the purpose of enforcing a division of the property acquired by William Sharon after August 25, 1880, and that she is seeking to dis-

cover and inspect the books of account kept by him, to the great injury and harassment of the complainants.

The bill also sets forth that the state court made an allowance of alimony by its order, as follows: "It is hereby ordered that the defendant (William Sharon) pay to the plaintiff (Sarah Althea) or her order, on or before the 9th day of March, 1885, the sum of \$7,500 as alimony herein; and the further sum of \$2,500 on or before the 8th day of April, 1885, and the same amount on or before the 8th day of each and every month hereafter as alimony, until the further order of this court;" that this judgment was afterward modified on appeal by the supreme court of the state on the 31st day of January, 1888, by striking out therefrom the words "the sum of \$7,500 as alimony herein, and the further sum of \$2,500 on or before the 8th day of April, 1886," and inserting in the stead and place of those words, "the sum of \$1,500 as alimony herein, and the further sum of \$500, on or before the 8th day of April, 1885;" that the said defendant Sarah Althea Terry is seeking to enforce that judgment, as modified, to the injury and harassment of the complainants; that the said judgment of alimony was founded upon and subsists essentially by virtue of the said declaration of marriage, adjudged by this court to be forged and fraudulent and fabricated, and that its execution and enforcement ought in equity to be restrained, as an infringement of the decree and prior jurisdiction of this court, and of the rights of the complainants thereunder. The complainants therefore pray that the decree in the original suit and the proceedings in enforcement and execution thereof may stand revived and be in the same state, plight and condition in which the same were at the time of the death of the said William Sharon; and that it may be declared that the complainants, as trustees and beneficiaries, as aforesaid, are entitled to revive the said decree and pro-

ceedings thereunder for the enforcement thereof, and to have the full benefit thereof, and to fully enforce and execute the same; and that the decree may be construed and adjudged to forbid and enjoin any and all proceedings in execution or enforcement of the said judgment of the said superior court for alimony; and for an accounting and division of the community property, and that said judgments may be declared void and of no effect as against the complainants, so far as they authorize any recovery of property or property rights; and that the defendants may be restrained, pending the suits, by an injunction, from taking any further proceedings to enforce or execute the said judgment for alimony, or the said judgment for an accounting and division of community property, and from commencing or maintaining any further suit or suits, proceeding or proceedings of any kind, under or upon either of said judgments against the complainants or any of them; and that such injunction upon the hearing may be made perpetual, and that they may have such other or further relief in the premises as may be just.

To these two bills to revive and enforce the decree in the case of *Sharon* vs. *Hill*, the defendants have appeared and demurred. The principal grounds of the demurrer in each case are that the court has no jurisdiction of the subject matter of the suits, or to grant the relief prayed; that the plaintiffs do not show any right or title to maintain their respective suits, and that there is ambiguity and uncertainty in the bills, in that they fail to show what particular property is involved.



## Opinion of the Court.

After filing the above statement of the case, Mr. JUSTICE FIELD delivered the opinion of the Court as follows:

As appears by the statement herewith filed, the decree of this court in the case of *William Sharon vs. Sarah Althea Hill*, entered as of the 29th of September, 1885, adjudged the alleged declaration of marriage between the parties, purporting to be executed on the 25th of August, 1880, to be a forgery, and ordered it to be surrendered and cancelled; and enjoined the defendant, and all parties claiming under her, from making any use of the same as evidence or otherwise to support any claim advanced under it, as wife of William Sharon, or to any interest in property of any kind against him, or his heirs, executors, or successors. William Sharon having died, Frederick W. Sharon, as the executor of his last will and testament, has filed one of the bills before us to revive and carry that decree into execution. Francis G. Newlands, as acting trustee, under a deed of trust, executed by William Sharon, a few days before his death, and certain beneficiaries under that deed, have filed the other bill before us, which is an original bill in the nature of a bill of revivor and supplement. It, also, has for its object to revive the decree in the original suit, and enforce its execution for their benefit.

The demurrers are in form to these bills, but the objections raised by them are intended to apply to the original bill in the suit of *Sharon vs. Hill*, and have been argued as though they were in terms directed against it, the position of counsel being that the circuit court possessed no jurisdiction of the subject matter of that suit, and no power to make

the decree entered therein; that the same was absolutely null and void, and therefore that there is nothing to revive. These objections could have been urged when the original bill was pending; and, in fact, were presented so far as they relate to the power of the court to grant the relief prayed. (10 Sawyer, 50.) And the general doctrine is that objections taken to the original bill, or which might have been thus taken, cannot again be made upon a bill of revivor where the original suit has abated by the death of the plaintiff. The only questions which can then be raised are whether the party in whose name the revival is asked has succeeded to the interests, rights or claims of the deceased, or has become the legal representative of his estate—so as to enable him to continue the prosecution of the suit, if not already determined, or to revive it so as to enforce the judgment rendered, if not already executed. If the suit be pending, undetermined, questions previously decided cannot be again raised and reconsidered, any more than they could if the plaintiff had not died, and if the suit has gone to final judgment, objections which might have controlled it, if presented in time, cannot be afterwards urged against its validity, any more than they could by a stranger to the record. An attack upon a judgment in a proceeding to revive it is a collateral attack, and can avail only when there is an absolute want of jurisdiction, either of the parties or of the subject-matter. The leading counsel of the defendants accepts this position, although his argument has covered a wider circuit and embraced many matters which could only be considered by us if we were sitting as a court of appeal, or upon a rehearing of the case. We reminded him indeed that we had no more power in the matter than the court which originally decided the case—the court is the same, its members

only being different—but we did not limit his argument. We felt the exceeding gravity of the case, and the serious consequences to the parties, whichever way the controversy may be finally determined. If we are to take the judgment of this court as valid and binding, and as importing absolute verity, as the law compels us to do, if the court had jurisdiction of the parties and subject, a case is presented which from its enormity may well make society shudder. We, therefore, have listened to and with assiduous care have examined every suggestion of the learned counsel, that we might reach if possible a just conclusion.

The main point of his argument is that the original suit was brought to cancel a piece of evidence, which might assist in establishing a marriage between the parties, but which of itself had no value capable of pecuniary estimation—that no such value is alleged in the pleadings, or could be—and therefore the suit is not within the jurisdiction of the circuit court of the United States under the Act of Congress of March 3, 1875, in force when the suit was commenced, prescribing and limiting that jurisdiction. That Act, as applicable to suits between citizens of different States, is as follows: “The circuit courts of the United States shall have original cognizance, concurrent with the courts of the several states, of all suits of a civil nature, at common law or in equity, where the matter in dispute exceeds, exclusive of costs, the sum or value of \$500 \* \* \* in which there shall be a controversy between citizens of different states.” (Act of March 3, 1875, U. S. Stats., Vol. 18, Chap. 137.) This statute, as counsel very justly claims, requires that there shall be a matter or thing in dispute susceptible of a pecuniary valuation, and exceeding the sum or value of five hundred dollars; that the money demand or thing of value must be directly involved in the suit which is tendered for judicial action. We



accept the statement as accurately expressing the limits of the jurisdiction of the circuit court, under the statute of 1875. A subsequent statute requires the sum or value of the matter in dispute to be \$2,000. By matter in dispute, as held by the supreme court, is meant, in an action at law, "the subject of litigation, the matter for which suit is brought, and upon which the issue is joined, and in relation to which jurors are called and witnesses are examined." If the case be one in equity instead of law, the definition is equally explicit, the words, "in relation to which jurors are called" being omitted. The matter at issue in the original suit of *Sharon vs. Hill* was the alleged contract of marriage between the parties, purporting to have been executed on the 25th day of August, 1880, and the object of the suit was to enjoin its use and obtain its cancellation as a forgery and a fraud. All the testimony was directed to the establishment of the genuineness of that instrument or to prove its forgery. As the fact was found one way or the other the character of the judgment would be determined. But it is insisted that this contract was not capable of pecuniary estimation; if forged, as claimed on one side, it would be a valueless paper; if genuine, as claimed on the other side, it could of itself establish no property rights in the defendant. What might ultimately result from the marriage which it might aid in proving was only prospective and contingent, lying among mere possibilities. We do not so construe the alleged contract, or the rights it conferred upon the alleged wife and the obligations it imposed upon the alleged husband. If genuine and valid it established a marriage between the parties from its date, assuming, as claimed by her, that it was followed by the requisite consummation.\* It is

---

\*NOTE, by FIELD, J.—By *requisite* consummation is meant, what the law required to render the contract operative as a marriage—such as openly living together as man and wife—or as the Statute states, "a mutual assumption of marital rights, duties or obligations." (Civil Code, Sec. 55.)



not a contract to marry at a future day, or an admission that a marriage has already taken place. It is an instrument by which, on the assumption mentioned, the marriage relation was immediately created. It therefore imposed upon him from that date all the obligations of a husband which the law creates, and among which is that of supporting the defendant as his wife, in a manner suitable to his condition of life. In her complaint in the state court, which became by her pleadings in the circuit court a part of the records there, she assumes that he was, when married, worth five millions of dollars, for she avers that he was not then worth more than that sum, with an income of thirty thousand dollars a month, and she alleges that since then, by their joint prudent management, he has become worth ten millions more, and his income has increased to one hundred thousand dollars a month. A reasonable allowance for her support which she might claim from him by virtue of that contract of marriage, if genuine and valid, would greatly exceed the amount required for the jurisdiction of the court.

Again, the contract, if genuine and valid, placed her in a position to claim her rights to a portion of the community property, that is property acquired by the earnings of both since its date. She alleges in the state suit that such earnings amounted to ten millions of dollars, and if so, under the law as his wife she would be entitled to one-half thereof on his decease, against any attempted testamentary disposition. It may be true that he could, notwithstanding the marriage, have disposed of the community property—given it away perhaps, so as to cut off any claim by her—but the law will not presume that a husband will act so as to defeat any rights which his wife might otherwise justly claim under the law, nor will a remedy of a court of equity be refused because one may place

his property where a claim cannot be enforced against it.

Again, the contract, if genuine and valid, gave her an inchoate right of dower in the real property which he then possessed in the District of Columbia, amounting in value to three hundred thousand dollars. That right, though to be enjoyed only in case of her surviving him, had a present substantial value, capable of pecuniary appraisal and of which he could not deprive her by any conveyance of the property without her joining with him. Tables are framed by which the value of such interest is estimated according to the probable duration of the lives of the parties; and compensation for the value of such interest is constantly made in the transfer of real property in states where the right of dower is allowed. (Scribner on Dower, Chap. 24, Tables in appendix.) Such right in the real property of Sharon in the District of Columbia would greatly exceed in value the amount required to give jurisdiction to this court.

We are therefore of opinion that an instrument—such as the declaration of marriage—which if genuine and followed by the requisite consummation as claimed, would impose upon the plaintiff the obligation to support the defendant Sarah Althea in a manner suitable to his condition; that would give her a right to claim one-half of the property in California, subsequently acquired by him, alleged to be of the value of \$10,000,000, and would give her an inchoate right of dower in real property in the District of Columbia, worth \$300,000—may be safely treated as having a pecuniary value exceeding \$500, the amount necessary to give the circuit court jurisdiction when the suit was commenced. It is true there is no statement in the pleadings in the original suit of the value of the property of the complainant. It is only alleged that he is possessed of a large fortune in real and personal prop-

erty; but that its value amounts to several millions of dollars does appear in the evidence presented in that case, and that is all that is necessary to maintain the jurisdiction. It is well settled that where the controversy is not respecting the amount or value of the matter in dispute, such amount or value when necessary to the jurisdiction may be shown by the evidence produced in the case, or by affidavits filed in behalf of the parties. On this ground the affidavits as to the value of real property owned by William Sharon in the District of Columbia, and also of the value of other property owned by him, were allowed to be filed during the argument. In *Ex Parte Bradstreet* (7 Peters, 634), application was made to the Supreme Court of the United States for a mandamus to compel the district judge of the Northern District of New York to reinstate and proceed to try certain writs of right to land, which were dismissed by him, because it did not appear that they involved the required amount to give the court jurisdiction, and to admit such amendments in the pleadings or such evidence as might be necessary to show that amount. In granting the mandamus the court, by Chief Justice Marshall, said: "In cases where the demand is not for money, and the nature of the action does not require the value of the thing demanded to be stated in the declaration, the practice of this court, and of the courts of the United States, is, to allow the value to be given in evidence. In pursuance of this practice, the demandant in the suits dismissed by order of the judge of the district court, had a right to give the value of the property demanded in evidence, at or before the trial of the cause; and would have a right to give it in evidence in this court." (See also *Wilson vs. Blair*, 119 U. S., 387, and *Den vs. Wright*, Peters Cir. Ct., 64, 73.) The practice of admitting such evidence as to the value of the matter in dispute, in order to give the Supreme

Court of the United States jurisdiction to review the judgments of inferior tribunals, where such value does not appear upon the records, is followed at every term.

The doctrine for which the learned counsel contends, if successfully maintained, would strip the federal courts of the most important branch of their jurisdiction in equity cases. That jurisdiction is remedial and preventive ; and to frustrate fraud and further justice, may be invoked for the reformation, delivery, or enforcement of contracts or other instruments, or for their surrender or cancellation. "It is obvious," says Story in his treatise on equity jurisprudence, "that the jurisdiction, exercised in cases of this sort, is founded upon the administration of a protective or preventive justice. The party is relieved upon the principle, as it is technically called, *quia timet*; that is, for fear that such agreements, securities, deeds, or other instruments may be vexatiously or injuriously used against him, when the evidence to impeach them may be lost; or, that they may now throw a cloud or suspicion over his title or interest." (Vol. I., Sec. 694.) And again : "If an instrument ought not to be used or enforced, it is against conscience for the party holding it to retain it; since he can only retain it for some sinister purpose. If it is a negotiable instrument, it may be used for a fraudulent or improper purpose, to the injury of a third person. If it is a deed purporting to convey lands or other hereditaments, its existence in an uncanceled state necessarily has a tendency to throw a cloud over the title. If it is a mere written agreement, solemn or otherwise, still, while it exists, it is always liable to be applied to improper purposes ; and it may be vexatiously litigated at a distance of time, when the proper evidence to repel the claim may have been lost, or obscured; or when the other party may be disabled from contesting its validi-



ty with as much ability and force as he can contest it at the present moment." (Ibid., Sec. 700.)

Now these instruments which may be thus controlled by the court, are only evidence of the right of the things to which they relate—they are not the things themselves—and in exercising jurisdiction to compel their reformation, delivery or enforcement, or their surrender, or cancellation, the court is merely acting upon the evidence by which the possession and enjoyment of the things may be advanced or defeated. The value of instruments in the sense by which the jurisdiction of the court is determined is the value of the property, the possession or enjoyment of which may be thus affected. Suits to cancel forged contracts, such as a forged deed, are of common occurrence. What is the value of the instrument in controversy in such cases? If it be forged its actual value is nothing; but for purposes of jurisdiction over it by the court, it must be held to have, to the rightful owner of the property, the value of the property the possession and enjoyment of which is imperilled by it. That such is the general understanding of the profession we have no doubt—for we can find no case where jurisdiction of the court has been denied—in the multitude of instances where it has been invoked, because such instrument is incapable of pecuniary estimation. It is everywhere assumed that the property which could be affected by it if genuine is the measure of its value for the purposes of jurisdiction. We might also refer, in support of this view, to that branch of equity jurisdiction which is exercised in discovering testimony or perpetuating it. What is the measure of value in such cases? Clearly for purposes of jurisdiction it must be estimated with reference to the value of the property in relation to which it is desired to discover or perpetuate the testimony.

A court of equity having jurisdiction to lay its hands upon and control forged and fraudulent instruments, it matters not with what pretensions and claims their validity may be asserted by their possessor ;— whether they establish a marriage relation with another, or render him an heir to an estate, or confer a title to designated pieces of property, or create a pecuniary obligation. It is enough that, unless set aside, or their use restrained, they may impose burdens upon the complaining party, or create claims upon his property by which its possession and enjoyment may be destroyed or impaired. It is of no consequence therefore that the bill in the original suit of *Sharon vs. Hill* may contain matters appropriate to a suit of jactitation of marriage in a spiritual court of England; it also presents matters of which a court of equity in that country and in this has always had jurisdiction—that is a case where the possession of a forged document by the defendant is alleged, purporting to be executed by the plaintiff, which if genuine, would impose obligations upon him and create claims upon his property.

The learned counsel of the defendants also contends that the bills cannot be maintained on the ground that the plaintiffs show no title in themselves or legal capacity to maintain the suits. As to the bill of revivor by the executor, Frederick W. Sharon, this position is assumed upon the theory that the decree in the original suit is self-executing; that the cause of action in that suit did not survive to the executor; that he only avers that he is the “personal representative” of the deceased plaintiff, without stating that any estate of the deceased has come into his hands. As to the original bill in the nature of a bill of revivor by Newlands and others, the further position is assumed that the original suit abated by the transfer by William Sharon of his property to trustees, under the deed of trust of No-

vember 4, 1885. To these several positions there is a ready and satisfactory answer found in the language of the original decree, in the law prescribing the powers and duties of executors, and in the terms of the deed of trust. The original decree is not self-executing in all its parts; it may be questioned whether any steps could be taken for its enforcement until it was revived. But if this were otherwise, the surrender for cancellation of the alleged marriage contract as ordered, requires affirmative action on the part of the defendant. The relief granted is not complete until such surrender is made. When the decree pronounced the instrument a forgery, not only had the plaintiff the right that it should be thus put out of the way of being used in the future, to his harassment and the embarrassment of his estate, but public justice required that it should be formally cancelled, that it might constantly bear on its face the evidence of its bad character whenever and wherever presented or appealed to. In *New York and New Haven Railroad Company vs. Schuyler* (17 N. Y., 592, 599), the court of appeals of New York said: "There is no head of equity jurisdiction more firmly established than that which embraces the cancellation of instruments which are capable of a vexatious use after the means of defense at law may become impaired or lost, or when they are calculated to throw a cloud upon the title or interest of the party seeking relief. \* \* \* Whatever their character, if they are capable of being used as a means of vexation and annoyance, if they throw a cloud upon title or disturb the tranquil enjoyment of property, then it is against conscience and equity that they should be kept outstanding, and they ought to be cancelled."

In *Peake vs. Highfield* (1 Russell, 559), a case which came before Lord Langdale, Master of the Rolls; in 1826, the bill prayed that an instrument purporting to be a deed of conveyance of real estate by a person

since deceased might be delivered up to be cancelled. The report of the case states that there was strong evidence that the deed was forged, though the defendant, who was charged with the commission of forgery, stated in his sworn answer that the deed was executed by the party whose deed it purported to be, and a witness testified that he was present at its execution. The defendant's counsel insisted on three points: "First, that a court of equity had no jurisdiction on the ground of forgery: secondly, that, even if the court had jurisdiction in such a case, it would never decree an instrument to be cancelled on the ground of its being a forgery, without sending the question to be tried by a jury: thirdly, that, at all events, it was impossible in the present case to order the deed to be cancelled without a trial at law; since there was a witness who swore he saw it executed." The Master of the Rolls maintained the jurisdiction of the court, although he ordered an issue to try the fact of forgery, and said: "This court has jurisdiction to order a forged instrument to be delivered up and cancelled. In the *Bishop of Winchester vs. Fournier*, several cases are mentioned, in which forged instruments have been ordered to be delivered up: and they are referred to by Lord Redesdale, as unquestioned authorities. In some of them the court made the order at once, that the instrument should be delivered up, without sending the question to be tried by a jury. In *Masters vs. Braban*, 10 July, 1735, the decree made at the hearing, declared a deed to be a forgery. It does not appear that the plaintiffs in the cause prayed that the deed might be declared to have been forged or might be delivered up to be cancelled; yet the court made the declaration, and gave the plaintiffs the consequential relief. In *Seccombe vs. Fitzgerald*, the bill was filed to set aside certain notes, and it also impeached a bond which was alleged to be



forged. The decree with respect to the bond was, that it should be delivered up to be cancelled."

In *Pierce vs. Webb and Stalker*, which was before Lord Chancellor Thurlow, in 1792, and is reported in a note to 3 Brown's Ch. Cases, pages 16 and 17, the bill prayed that a certain lease of land might be declared fraudulent and delivered up to be cancelled. It was contended on the part of the defendants that no use could be made of the lease at law, and that equity could not in such a case compel the delivery of a deed, and further that the defendant Stalker, having proved expenses for lasting improvements, was entitled to those allowances; but the Lord Chancellor decreed for plaintiff with costs and ordered the lease to be delivered up to be cancelled, and did not admit any allowances for improvements, saying that "It has never been doubted that if a man would create a forged deed (of which no use could be made at law), yet equity will interfere and deliver it up."

The doctrine of these cases, as observed by counsel, is in accordance with the statute of this State, which declares that "a written instrument, in respect to which there is a reasonable apprehension that if left outstanding it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or cancelled." (Civil Code, 3412.)

The cause of action set forth in the original suit survived to the executor. Its object was to have set aside and cancelled an instrument which, if genuine and valid, created a claim on the part of the defendant to be supported out of the property of the plaintiff, and inchoate rights which on his death would entitle her to a large share of that property. Had no such suit been brought by William Sharon, his executor could have brought one. Indeed it would be his duty to do so if he believed the instrument a forgery. For the same

reasons it is his duty to see that the decree is enforced so far as it may be necessary to protect the property of the deceased against any fraudulent claims, or interfere in any way with its disposition as directed by his will, and for that purpose to seek a revival of the decree. Under the law of this State, the executor, or administrator when there is no will, is entitled to the possession of all the real and personal property of the deceased, until the estate is fully administered, or a decree of distribution is made by the probate court. The heirs or devisees of the deceased can only take possession upon such distribution. Until then the executor or administrator represents the heirs and devisees, also the creditors of the deceased, and in the interest of all of them is bound to use all lawful means, by suit or otherwise, to preserve and protect the estate against all fraudulent claims by which the title or value of the property in his charge may be impaired. This duty devolves upon them from the very nature of their office, (*Meeks vs. Vassault*, 3 Sawyer, 213; *Cunningham vs. Ashley*, 45 Cal., 485), and is independent of the specific powers and duties prescribed by statute. In *Curtis vs. Sutter* (15 Cal., 264), a suit by an administrator to quiet the title of an intestate to real property, was sustained by the supreme court of the state against the objection that it was improperly brought in his name. If a suit of that nature may be brought, it is not perceived, as counsel justly observes, why a suit *quia timet* may not be brought by an executor to cancel a forged paper—and, if so, why he may not file a bill of revivor to obtain the benefit of a decree rendered in favor of the deceased in a suit of that character. We have no doubt that whatever suit the deceased might have brought for the protection of his estate from unreasonable, illegal and fraudulent claims, his executor may bring, and whatever judgments the deceased may have obtained for that protection, which the courts had

jurisdiction to render, and which have not been fully enforced, his executor may have revived and enforced. The fact that the executor in his bill simply describes himself as the personal representative of the deceased, without averring that any property of the latter had come into his hands, is of no moment. The bill of revivor is to be read in connection with the record in the original suit, which declares that the deceased was possessed of a large property, real and personal; and it will be presumed that it came into the hands of his executor, where the law places it, in the absence of averments to the contrary. Besides, the only question which can be considered on this bill to revive, is whether the plaintiff is executor of the deceased and thus succeeds by operation of law to the charge of his property; and this fact is admitted by the demurrer. As said by Mr. Justice Story in *Slack vs. Walcott* (3 Mason, 508, 512), "When a party plaintiff dies, whose interest is transmitted to some other person, if the title be that of mere representation in law, there is no change in the title itself, and the only question, that arises, is, who is the person entitled to take as representative, that is, in respect to real estate, who is the heir, and in respect to personal estate, who is the executor or administrator. When this fact is ascertained, the person succeeds by operation of law to the whole title of the deceased. A bill of revivor in such case merely substitutes the representative in lieu of the deceased, and states no new fact as to title, except that of transmission by operation of law. The title of representation, or heirship, at least in a court of chancery, is not disputable; but the person, in whom it is vested, is alone to be ascertained."

The objection that the bill does not describe specifically the property of the deceased is without force. The fact appears in the record of the original suit that



the deceased possessed a large and valuable property, the right to portions of which would be affected by the alleged contract if genuine and valid. But it is earnestly contended both against the bill of revivor and against the original bill in the nature of a bill of revivor, that the suit in the circuit court abated by the transfer of the decedent's property under the deed of trust of November 4, 1885, and therefore the court could not proceed any further therein. Both of the bills have the same object—to revive the original decree and enforce its execution, the latter being necessary because the trustees and beneficiaries under the trust deed take by a title which may be contested, and not like the executor by operation of law. As said in *Slack vs. Walcott*, “When a party plaintiff claims a title by purchase or devise, he introduces a new title not previously in the case, and which is controvertible, not merely by the defendants in the bill, but also by the heirs at law. As to these parties the suit is original; it does not merely revive the old suit, but it states new supplementary matters calling for an answer. So far then as it states such matter, it is an original bill; and so far as it seeks to revive upon that matter, it is in the nature of a bill of revivor.” But as held in the same case, purchasers and devisees by an original bill in the nature of a bill of revivor may draw to themselves the advantages of the former suit, in whatever stage it may be at the time of the abatement.

To the alleged abatement of the original suit, by the transfer of the decedent's property, there are three answers, each of which is complete. In the first place the reservations in the trust deed of power in the grantor to claim during his life the payment of the net income, rents, issues and profits of the property remaining after certain monthly payments to his children, and to his son-in-law for his grandchildren, continued in him sufficient interest in the property to maintain



the suit to cancel a forged document, which might lessen the amount of such income, rents and profits. In the second place, the decree having been entered as of September 29, 1885, was with reference to the trust deed subsequently executed, as though the decree had been announced by the court as of that day. (*Mitchell vs. Overman*, 103 U. S., 62; *Borer vs. Chapman*, 119 U. S., 596-97.) In the third place, the deed of trust having been made *pendente lite* the trustee and beneficiaries took subject to the decree which might be subsequently rendered. The suit being to revoke and cancel an instrument which might otherwise lessen the value of the estate, and having been heard and submitted for decision it is to be presumed, in the absence of any application by the trustees and beneficiaries to be substituted as plaintiffs, that they desired that the case should be held for such determination in their interest. While they might properly have asked to be joined with the plaintiff, they were not bound to do so. The court had jurisdiction to proceed without them to render the decree.

Having disposed of the objections to the jurisdiction of the circuit court of the United States in the original suit of *Sharon vs. Hill*, we proceed to consider how far the judgment therein is affected, or should have been affected, if at all, by the judgment in the state court.

William Sharon, being a citizen of Nevada, had a constitutional right to ask the decision of the federal court upon the case presented by him; and it would be a strange result if the defendant, who was summoned there, could, by any subsequent proceedings elsewhere, oust that court of its jurisdiction and rightful authority to decide the case. The constitution declares that the judicial powers of the United States shall extend to controversies between citizens of different states—a provision which had its origin in the impression that local attachments and prejudices might injuriously

affect the administration of justice in the state courts against the claims of citizens of other states. (*Railway Company vs. Whitton*, 13 Wall., 270, 289.) So valuable has the right of citizens of other states than the one in which suits are brought against them to have their cases heard in a federal court, always been regarded, that at the very outset of the government Congress provided, and in different acts since has renewed the provision, that when a citizen of another state is sued in a state court he may, under proper application, accompanied by an offer of good and sufficient surety for entering copies of the proceedings and his appearance in the federal court, have the case removed to that court and tried or heard there; and all the acts of Congress have declared that it shall be the duty of the state court in such a case to accept the surety and to proceed no further in the cause. Any subsequent proceedings there are null and void, and will be so treated by the federal courts. As said by the Supreme Court in *Railroad Co. vs. Koontz* (104 U. S., 14), it is well settled that "when a sufficient case for removal is made in the State court, the rightful jurisdiction of that court comes to an end, and no further proceedings can properly be had there, unless in some form its jurisdiction is restored." As Congress has made such careful provision to secure to citizens of other states a right to transfer to a federal court cases in which they are sued in state courts, and prohibited further proceedings therein after proper application is made for removal, it would be strange, we repeat, if a defendant properly summoned in the first instance into that court by a citizen of another state, could cut off and practically nullify the latter's constitutional right to a hearing there by instituting a suit in a state court, which might involve in some of its phases a determination of the same matters. Such a pretension, as said in one of the authorities cited, cannot be tolerated. The jurisdic-

tion of the federal court having attached, the right of the plaintiff to prosecute his suit to a final determination there cannot be arrested, defeated or impaired by any proceeding in a court of another jurisdiction. This doctrine we hold to be incontrovertible; it is essential to any orderly and decent administration of justice and to prevent an unseemly conflict of authority, which could ultimately be determined only by superiority of physical force on one side or the other.

In *Wallace vs. McConnell* (13 Peters, 143), we have a decision of the Supreme Court of the United States illustrative and confirmatory of this doctrine. That case was brought in the district court of the United States for the district of Alabama, exercising the powers of a circuit court, upon a promissory note of the defendant for \$4,880. The defendant pleaded payment and satisfaction, and issue being joined therein, the case was continued until the succeeding term. The defendant then interposed a plea of *puis darrein* continuance, alleging that as to \$4,204 of the sum demanded, the plaintiff ought not further to maintain the action against him, because that sum had been attached in proceedings commenced against him under the attachment law of Alabama, in which he was summoned as garnishee. In those proceedings he had admitted his indebtedness beyond a certain payment made, and the state court gave judgment against him for the balance. To this plea the plaintiff demurred, and the demurrer was sustained. The case was ultimately taken to the Supreme Court, where it was contended that the proceedings under the attachment law of Alabama were sufficient to bar the action as to the amount of the sum attached, and that therefore the demurrer ought to have been overruled. But the court said: "The plea shows that the proceedings on the attachment were instituted after the commencement of this suit. The jurisdiction of the District Court of the

United States, and the right of the plaintiff to prosecute his suit in that Court, having attached, that right could not be arrested or taken away by any proceedings in another Court. This would produce a collision in the jurisdiction of Courts, that would extremely embarrass the administration of justice."

In *Taylor vs. Taintor* (16 Wallace, 370), the Supreme Court, speaking by Justice Swayne, said: "Where a State court and a court of the United States may each take jurisdiction, the tribunal which first gets it holds it to the exclusion of the other, until its duty is fully performed and the jurisdiction invoked is exhausted: and this rule applies alike in both civil and criminal cases. It is, indeed, a principle of universal jurisprudence that where jurisdiction has attached to person or thing, it is—unless there is some provision to the contrary—exclusive in effect until it has wrought its function."

In *Shoemaker vs. French* (Chase's Dec., 267), a bill was filed in the circuit court of the United States for the district of Virginia by the plaintiff Shoemaker for an injunction to prevent the defendant French from acting as President of the Alexandria and Washington railroad company, and an order was made directing that he be served with notice of motion for the injunction. After this French filed a bill in a state court of Virginia, praying an injunction against Shoemaker for matters cognate to the bill in the circuit court; and Chief Justice Chase, in granting the prayer of the bill in the circuit court, said: "The jurisdiction of this court as to these matters attached when Shoemaker's bill was filed here, and the order passed by this court. Therefore the jurisdiction of the state court was ousted, or must be exercised in subordination to the jurisdiction of this court."

The doctrine that where different courts may entertain jurisdiction of the same subject, the court which



first obtains jurisdiction will retain it to the end of the controversy, either to the entire exclusion of the other or to the exclusion so far as to render the latter's decision subordinate to that of the other, prevails very generally both in the federal and state courts, with some exceptions which we shall hereafter consider. Thus in *Gaylord vs. Fort Wayne, Muncie and Cincinnati Railroad Company*, a bill was filed in the circuit court of the United States for the district of Indiana to obtain among other things the appointment of a receiver of the property of an insolvent corporation, and to administer it for the benefit of the creditors. After a demurrer to the bill had been sustained and an amendment made, a receiver was appointed. Whilst proceedings were thus pending in the federal court, a suit was commenced in a state court of Indiana in which a receiver was also appointed, who took possession of the property. Subsequently the parties thus having possession surrendered the property to the receiver of the federal court upon his application and the presentation of its order. He was thereupon arrested by the state court, but the federal court released him, and he retained the property, the court refusing to rescind the order appointing him. In disposing of the case the federal court said: "We think that there is no other safe rule to adopt, in our mixed system of state and federal jurisprudence, than to hold that the court which first obtains jurisdiction of the controversy, and thereby of the *res*, is entitled to retain it until the litigation is settled." (6 Biss., 286, 291.)

In *Union Mutual Life Insurance Company vs. Chicago University*, a bill was filed in a state court of Illinois to enjoin the foreclosure of a mortgage, and have it set aside and declared void. Later on the same day a bill was filed in the circuit court of the United States for the Northern District of Illinois to foreclose the mortgage. The process of the federal

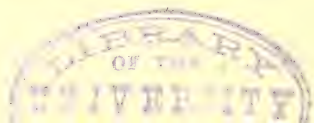
court was first served, preceding by a few hours the service of process from the state court; and it was held that the fact that process from the federal court was first served gave that court jurisdiction to go on with the foreclosure suit and determine all questions as to the validity of the mortgage. In deciding the case the court, speaking by Judge Drummond, said: "It is undoubtedly a very embarrassing state of litigation, there being two suits, brought in two jurisdictions, involving, to a great extent, the same subject matter, and I have felt some difficulty in determining what is the true rule upon this subject, but I have come to the conclusion that it must be this: That this court has a right to go on as I have already said, and decide all questions which legitimately flow out of the subject-matter of controversy in this case, namely, those affecting the existence of the mortgage and the right of the University of Chicago to make it, so as to reach a decree, if the case warrants it, which shall be conclusive upon the University of Chicago; that is to say, which shall prevent that corporation from ever setting up any claim or right to this property, or any claim whatever that it had not the right to execute this mortgage." (10 Biss., 191, 195.)

In *Mason vs. Piggott*, in the supreme court of Illinois, it appeared that the defendant, instead of making a defense in an action pending in a court of law, had attempted to transfer the case to a court of equity, and the court said: "It by no means follows because a Court of Equity has concurrent jurisdiction with a Court of law, that it will take cognizance of a case already pending in a Court of law, and oust it of jurisdiction. As a general principle, in all cases of concurrent jurisdiction, the tribunal which first obtains jurisdiction of the subject-matter, must proceed and finally dispose of it. A Court of Equity will not take jurisdiction where it has first been acquired by a Court

of law, unless there is some equitable circumstance in the case which the party cannot avail himself of at law. Subject to this qualification, the rule is inflexible." (11 Ill., 88.)

In *Bank of Bellows Falls vs. Rutland R. R. Co.*, in the Supreme Court of Vermont, it appeared that the defendant, in an action at law pending against him in Massachusetts, had filed his bill in a Vermont court of chancery to enjoin the action. The bill was dismissed, and the court, admitting the power of a court of equity to enjoin parties within its jurisdiction from proceeding in a court of law in another state, said: "We hold it to be a sound rule of law, based upon the most salutary principle, that in all cases of concurrent jurisdiction, the court that has first possession of the matter should be left to decide it, unless there exists some peculiar equitable ground for withdrawing a controversy from a court of law to a court of chancery, and which disenables the party, having the law in his favor, from bringing his case fairly and fully before a court of law. This principle is founded upon the courtesy which courts of concurrent jurisdiction should exercise towards each other, and may be necessary, as matter of policy, to prevent a conflict in the action of different courts." (28 Vt., 470-477.)

In *Stearns vs. Stearns*, in the supreme court of Massachusetts, a decree of the probate court appointing commissioners to make partition of an estate among the heirs was reversed, because proceedings were first commenced for that purpose in another court of concurrent jurisdiction against the parties moving the decree, which proceedings were pending when the decree was rendered, the court saying that "when different courts have concurrent jurisdiction, the one before whom proceedings may be first had, and whose jurisdiction first attaches, must neces-



sarily have authority *paramount* to the other courts; or, rather, the action first commenced shall not be abated by an action commenced between the same parties in relation to the same subject, in the same or any other court." (16 Mass., 170.)

The case of *Home Insurance Company vs. Howell*, in the court of chancery of New Jersey, presents some features similar to the case at bar. The complainant filed its bill for relief against two policies of insurance, which it alleged the defendant had fraudulently obtained from it upon his property in Illinois. The bill prayed that the policies might be delivered up and cancelled or declared invalid, and that the defendant might be perpetually enjoined from bringing any suit at law or equity upon them, or making use of them in any way for the purpose of establishing any claim or damage against the complainant. The defendant appeared and filed an answer, to which a replication being made, proofs were taken. After the suit was commenced the defendant brought an action at law upon the policies against the company in a State Court of Illinois, which suit was on its petition removed into the circuit court of the United States for the northern district of Illinois. The company thereupon filed its petition in the Court of New Jersey for an injunction to restrain him from prosecuting the suit in Illinois. An injunction having been issued, a motion was made to dissolve it. In denying the motion, the Chancellor said: "This court having the power to hear and determine the subject-matter in controversy, and *having first obtained possession of the controversy, is fully at liberty to retain it until it shall have disposed of it.*" The general rule is, that as between courts of concurrent and co-ordinate jurisdiction, (and the Circuit Court of the United States and the state courts are such in certain controversies—such as that involved



in this suit, for example—between citizens of different states,) the court that first obtains possession of the controversy must be allowed to dispose of it without interference from the co-ordinate court.” \* \* \*

“Where a party is within the jurisdiction of this court, so that on a bill properly filed here this court has jurisdiction of his person, although the subject matter of the suit may be situated elsewhere, it may, by the ordinary process of injunction and attachment for contempt, compel him to desist from commencing a suit at law, either in this state or any foreign jurisdiction, and of course from prosecuting one commenced *after* the bringing of the suit in this court.” (24 N. J., Eq., 239.)

In *Brooks vs. Delaplaine*, the high court of chancery of Maryland dismissed a bill in equity because at the time it was filed a suit involving the same controversy was pending in the county court having concurrent jurisdiction, the chancellor saying: “When two courts have concurrent jurisdiction over the same subject matter, the court in which the suit is first commenced, is entitled to retain it. This rule would seem to be vital to the harmonious movement of courts whose powers may be exerted within the same spheres, and over the same subjects and persons. \* \* Any other rule will unavoidably lead to perpetual collision, and be productive of the most calamitous results.” (1 Md. Ch., 354.)

Similar decisions might be cited from the highest courts of nearly every state, for upon the principle stated there is, with certain well recognized exceptions, a general concurrence of opinion.

Where two judgments relating to the same subject are irreconcilable, both cannot be enforced. One or the other must give way; and the only reasonable test by which the superiority of one over the other is to be determined is that which is ex-

pressed in the authorities cited, that the court which first obtains jurisdiction of the subject and parties must have the right to proceed to judgment. Having first acquired possession of the subject, it cannot be rightly ousted by subsequent proceedings in another court having no supervising or appellate authority. If the time of the rendition of the judgment independently of the commencement of the suit were to be the test, the superiority of judgment, as counsel well observe, would depend on mere accident, or circumstances beyond the power of the court or parties, as one court may have a large calendar and be blocked up with business, creating great delay in the disposition of causes, while the other court may have few causes, and those of minor importance, and thus be enabled to speedily dispose of them. It would give the latter court pre-eminence because it is enabled from paucity of cases to dispose of its calendar at an earlier day, and might, as suggested, tend to an unseemly scramble of litigants to speed cases in the respective courts of their preference.

The exceptions to the doctrine that priority of jurisdiction controls priority of decision to which we have referred, and to which our attention has been called by counsel of the defendants, will be found on examination to range themselves under two classes: First—Where the same plaintiff has asked in the different suits a determination of the same matter; as, for instance, where different obligations are issued upon the same transaction, which is attacked in each suit as fraudulent and illegal, and therefore vitiating the several obligations; or, where the jurisdiction of a court of equity as well as a court of law is invoked by him with reference to the matter. Of course a decision first rendered in either suit may be pleaded in the others—the plaintiff must abide the adjudication which he has sought; and Second—Where the cases are upon

contracts or obligations which from their nature are merged in the judgment rendered, the subject upon which the first suit is founded having thus ceased to exist.

The cases of *Duffy vs. Lytle*, 5 Watts, 120; *Rogers vs. Odell* 39 N. H., 452; *Child vs. Powder Works*, 45 N. H., 547; *Bank of U. S. vs. Merchants Bank*, 7 Gill, 415, and *Westcott vs. Edmunds*, 68 Pa. St., 34, fall under one or the other of these classes. The language quoted from *Buck vs. Colbath* (3 Wall., 345), was used as explanatory of the general doctrine that in examining into the exclusive character of the jurisdiction of a court, we must have regard to the nature of the remedies, the character of the relief sought, and the identity of the parties in the different suits. The illustration given of a party suing in a court of chancery to foreclose his mortgage, and in a court of law to recover judgment on his notes, and in another court of law in an action of ejectment to recover the possession of the land would have brought the supposed case, if a real one, under the first class of exceptions stated above, where a decree first rendered in either suit upon the same point, could have been pleaded as conclusive in the others. In the *Tubal Cain* case (9 Fed. R., 834), the judgment of the state court pleaded in the United States district court was recovered *in the prior action*, and the circuit court stayed its proceedings to await the determination of an appeal from the judgment. The other authorities cited do not seem to us, after careful consideration, to be entitled to any weight upon the question presented.

The case at bar is not within either of the expected classes. The plaintiff has not invoked the jurisdiction of the state court; and the alleged marriage contract is not one which in any sense of the rule was merged or could be merged in the judgment, any more than a deed, upon which title to

real estate is asserted, is merged in a judgment in ejectment for the possession of the property. It was as much an outstanding and existing contract after the judgment of the state court as before, and was equally available for all purposes. But aside from this, the doctrine of the excepted cases can have no application to cases instituted in a federal court by a citizen of another state, so as to give paramount authority to a judgment of a state court in a suit subsequently commenced against him, without defeating a most important right conferred upon him by the Constitution and laws of the United States—a result which can in no manner be accomplished either directly or indirectly. (See *Suydam vs. Broadnax*, 14 Peters, 67, and *Payne vs. Hook*, 7 Wall., 430.)

It is true that in the decision of the case Judge Deady expressed his opinion to the effect that as the validity and genuineness of the declaration of marriage were invoked in the state court, its determination would be conclusive, and estop the plaintiff in this court to show the contrary, if it had not been obviated by the appeal from the judgment. We do not concur with the learned judge in this view, for reasons already stated; but, assuming it to be sound, we agree with him that the effect of the appeal was to prevent the judgment from becoming final, and to destroy its efficacy as evidence. By the act of Congress the judgment could only have such faith and credit given to it as it has by law or usage in the courts of the state; and by the law of the state its operation as evidence is superseded by an appeal. The code provides that when an appeal is perfected “it stays all further proceedings in the court below upon the judgment or order appealed from, or upon the matters embraced therein,” and also that “an action is deemed to be pending from the time of its commencement until its



final determination upon appeal, or until the time for appeal has passed, unless the judgment is sooner satisfied." Such is the express language of the code. (Secs. 946 and 1049.) And as the district judge observes, these provisions are in conformity with the law previously existing, according to which an appeal not only stayed the execution of a judgment, but suspended its operation for all purposes. Thus in *Woodbury vs. Bowman* (13 Cal., 634), which was decided before the adoption of the code, the record of a judgment from which an appeal was pending was offered in evidence and rejected, and the court in affirming the ruling said: "We think it was properly rejected; the appeal having suspended the operation of the judgment for all purposes, it was not evidence in the questions at issue, even between the parties to it." And in *Murray vs. Green* (64 Cal., 369), decided since the adoption of the code, the record of a judgment in a case then on appeal was offered in evidence and rejected; and the court in sustaining the decision said that while the appeal was pending "the operation of that judgment for all purposes was suspended, and it was not admissible in evidence in any controversy between the parties."

The circuit judge did not concur with the district judge as to what would be the effect of the judgment in the state court, if it were final, observing that it was unnecessary to determine that question, and that he reserved his opinion upon it until it should properly arise for judicial determination, and until an opportunity was had for its full discussion and mature consideration. But the circuit judge did concur with the district judge as to the effect of the appeal in destroying the judgment of the state court as evidence of any kind in the federal court. It was of no avail, therefore, when pleaded as an estoppel; it was not evidence of the truth of the matters found, much less conclusive

evidence. The ruling of the circuit court in refusing its consideration was therefore correct at the time; and if correct then, it could not become erroneous by any subsequent event. The affirmance of the judgment since has no retroactive operation so as to make that ruling bad which was then sound. But more than this, there is still pending an appeal to the supreme court from an order refusing a new trial in the state court. The judgment therein has not therefore even yet become final; it does not yet establish as between the parties the verity of the findings. In the recent case of *Gillmore vs. Central Ins. Co.* in the supreme court of this state (65 Cal., 65, 66), the effect of a pending motion for a new trial upon the finality of a judgment was considered. There a stipulation had been made that all proceedings should be stayed until *final judgment and decision* in another action. It was contended that the judgment in that action had become final within the meaning of the stipulation after a year had elapsed from its entry without an appeal being taken from it. There was pending a motion for a new trial, and the court said: "Although no appeal had been taken from the judgment within the statutory time, proceedings were pending, upon a motion made by the defendant in the case, to vacate the judgment and grant a new trial. That motion subjected the judgment to be reviewed, and made it liable to be set aside. The judgment was therefore not final, in the sense of the stipulation as to the right of the parties affected by it, and could not become so until the motion for a new trial had been disposed of. (*Hills vs. Sherwood*, 33 Cal., 474.) While proceedings are pending for the review of a judgment, either on appeal or motion for a new trial, the litigation on the merits of the case between the parties is not ended, and until litigation on the merits is ended, there is no finality to the judgment, in the sense of a final determination of the rights of the

parties, although it has become final for the purpose of an appeal from it." (See also *Fulton vs. Hanna*, 40 Cal., 278.)

It remains to consider the further objections of the defendants that the priority of jurisdiction of the federal court was waived by the stipulation to remand the case originally commenced in the state court from the federal court, to which it had been removed, back to the state court; that the failure to present to the state court the judgment of the federal court, was an abandonment of its protection; and that the execution of the decree in the federal court by injunction against prosecuting proceedings under the judgment of the state court is forbidden by the act of congress prohibiting the issue of an injunction to stay proceedings in a state court except in cases of bankruptcy. (R. S. Sec. 720.)

The alleged waiver of priority of jurisdiction by the federal court because of the consent of parties to remand the case commenced in the state court back to it, after its removal, was considered on the argument in the original suit and held to be without force. A statement of the circumstances of the remanding is sufficient answer to the position. The case commenced in the state court by the alleged wife Sarah Althea against Sharon, praying that her alleged marriage be declared legal and valid and then that a divorce be decreed, was removed on the application of the defendant therein to the federal court on the supposition that he had a right to have it heard there. The plaintiff therein denied that right, on the ground that the subject matter being an action for a divorce was not within the jurisdiction of the court, and moved to remand it back to the state court. The defendant's counsel appears to have come to the conclusion that her motion would be granted, and instead of waiting for the order

of the federal court to that effect consented that the case might be remanded—and that is all there is of the alleged waiver. The consent waived no rights of priority by the original suit; nor in any respect affected its position. It would be strange if the remanding of one action by consent, should change or affect in any degree the jurisdiction of the court over another and different action, to which the consent made no reference.

The position that the protection of the decree of the federal court was waived because the attention of the state court was not called to it, either on the motion for a new trial, or on the argument of the appeal in the supreme court, merits careful consideration. There is not, and certainly ought not to be, anything so unseemly as rivalry and contention between the courts of the state and the courts of the United States. Both have large and responsible duties in the administration of justice for the American people, and we are sure that neither has any desire to encroach upon the jurisdiction and rightful authority of the other. And yet as both courts have on many subjects concurrent jurisdiction, it will sometimes happen that there will be a conflict of decision between them, and then a proper respect for each other will induce both to seek a solution consistent with the just rights of the parties. We think, therefore, it would have been a proper proceeding for the plaintiff in the original suit—the defendant in the state court—to have called the attention of that court, and of the supreme court of the state in some formal way to the decision and decree of the federal court—not for the purpose of changing any alleged rulings had in the state courts, but in order to secure a stay therein of all further proceedings in them. The whole controversy in the state court rested upon the alleged validity of the marriage contract, and this fact is fully set forth in its findings. The



decree in the federal court adjudged that contract to be a forgery, and ordered its surrender and cancellation. If this decree be a final one, and the court had jurisdiction to render it, there can be no doubt that it should, when presented to the state courts, stay all proceedings therein. Those courts would only be called upon to give full faith and credit to it, not to reverse or review any of their rulings, but to act upon a fact, conclusive of the case, for the first time brought to their attention. They would only be called upon to do what they would do upon official notice to them of any other fact which would conclude a pending controversy. If, for example, there should be brought to a *nisi prius* court after a conviction of an accused party of murder, or before the supreme court of the state on appeal from the judgment, official notice that the convict had been pardoned subsequent to the conviction, the *nisi prius* court would not thereupon grant a new trial, or the supreme court reverse the judgment, but both courts might properly be called upon to stay all proceedings upon the conviction—and an order to that effect, reciting the pardon, might be made. So, too, if whilst argument is going on upon the appeal, the supposed murdered man should walk into court and present himself, I think the court, though it might find no error in the ruling of the lower court, would readily find a way to stay execution of the judgment, upon reciting the personal appearance of the supposed murdered man. So we think the decree of the federal court might have been officially presented to the state courts, and a stay of proceedings in the action there asked. But it was not obligatory upon the defendant in the state courts to present to them the federal decree. He might think proper to await the final action of those courts, and if the judgment of the superior court should be ultimately sustained, present the federal decree

to stay its enforcement. He might very well have deemed it wise to wait until the time to appeal from the federal decree had expired before calling upon the state courts to give effect to it in proceedings before them. The time to appeal did not expire until the 15th of January, 1888, after the motion for a new trial had been heard in the lower court, and the appeal had been heard and submitted in the supreme court. The decree was entered as of September 29th, 1885, and was as effectual for all purposes as if it had been announced on that day, except where the rights of others may have been prejudiced thereby; and to prevent such prejudice in shortening the time to appeal, it must be deemed to have commenced running only from the date of its actual entry.

There was no effective appeal from the decree in the federal court taken during the statutory period. There was an attempt by the defendant to appeal, and an order was made allowing an appeal, but as this was before the case was revived the order was improvidently made and was without any efficacy. Where a suit has abated by the death of the plaintiff after judgment, no appeal can be taken by the defendant until the case is revived. (*McClane vs. Boon*, 6 Wall., 244.)

The decree of the federal court when revived may be used to stay any attempted enforcement of the judgment of the state court. The case of *Boynton vs. Ball* (121 U. S., 462), is illustrative of this doctrine, and has a direct bearing upon the question. There a party who had filed a petition for the benefit of the bankrupt law, was sued for a debt in a state court of Illinois. Although he could have applied, under the Act of Congress, to the state court for a stay of proceedings until the disposition of his petition in bankruptcy, he made no application of the kind, and judgment passed against him there. When he subsequently obtained

his discharge in bankruptcy, he presented it to that court and moved for a perpetual stay of execution on its judgment. The motion was denied, and the supreme court of the state affirmed the ruling. The case was then taken on writ of error to the supreme court of the United States, where the judgment of the supreme court of Illinois was reversed. After citing the section of the bankrupt act giving the right of the party to stay proceedings in the state courts, the supreme court of the United States said: "The whole section is also clearly impressed with the idea that this is a provision primarily for the benefit of the bankrupt, that he may be enabled to avoid being harassed in both courts at the same time with regard to such debt. It is therefore a right which he may waive. He may be willing that the suit shall proceed in the state court for many reasons; first, because he is not sure that he will ever obtain his discharge from the court in bankruptcy, in which case it would do him no good to delay the proceedings at his expense in the state court; in the second place, he may have a defense in the state court which he is quite willing to rely upon there, and to have the issue tried; in the third place, he may be very willing to have the amount in dispute liquidated in that proceeding, in which case it becomes a debt to be paid *pro rata* with his other debts by the assignee in bankruptcy. If for any of these reasons, or for others, he permits the case to proceed to judgment in the state court, by failing to procure a stay of proceedings under the provisions of this section of the bankrupt law, or the assignee in bankruptcy does not intervene as he may do, *Hill v. Harding*, 107 U. S. 631, he does not thereby forfeit his right to plead his final discharge in bankruptcy, if he shall obtain it, at any appropriate stage of the proceedings against him in the state court. And if, as in the present case, his final discharge is



not obtained until after judgment has been rendered against him in the state court, he may produce that discharge to the state court and obtain the stay of execution which he asks for now."

The failure to present the decree to the state courts did not, therefore, in our opinion, lessen its efficacy and will not prevent it when revived from being hereafter presented to them, and does not impair in any respect the power of this court to enforce its execution.

The prohibition against the issue of an injunction by a court of the United States to stay proceedings in a state court, is found in section 5 of the Act of March 2, 1793, I Stat. 334, and has been continued in force ever since. It is now contained in section 720 of the revised statutes, with an exception relating to proceedings in bankruptcy, and is as follows: "The writ of injunction shall not be granted by any court of the United States to stay proceedings in any court of a State, except in cases where such injunction may be authorized by any law relating to proceedings in bankruptcy." Notwithstanding the very general terms of the prohibition, with the single exception mentioned, it has been settled that it does not apply where the federal court has first obtained jurisdiction, or where the state court having first obtained jurisdiction the case has been removed to the federal court. In such cases the federal court may restrain all proceedings in a state court which would have the effect of defeating or impairing its jurisdiction. It extends only to cases in which the jurisdiction of the state court has first attached; with its proceedings then no federal court can interfere by injunction.

In *Fisk vs. The Union Pacific Railroad Co.* (10 Blatchford, 520), the circuit court of the United States for the southern district of New York issued an injunction restraining that corporation from taking any steps in a



state court to procure its own dissolution, and the effect of the statute in question was considered. Judge Blatchford, now one of the justices of the supreme court, in deciding the case said: "The provision of section 5 of the Act of March 2d, 1793, (1 U. S. Stat. at Large, 334, 335), that a writ of injunction shall not be granted to stay proceedings in any Court of a State, has never been held to have, and cannot properly be construed to have, any application except to proceedings commenced in a Court of a State *before* the proceedings are commenced in a Federal Court. Otherwise, after suit brought in a Federal Court, a party defendant could, by resorting to a suit in a State Court, defeat, in many ways, the effective jurisdiction and action of the Federal Court, after it had obtained full jurisdiction of person and subject matter. Moreover, the provision of the Act of 1793 must be construed in connection with the provision of section 14 of the Act of September 24th, 1789, (1 U. S. Stat. at Large, 81, 82), that the Federal Courts shall have power to issue all writs which may be necessary for the exercise of their respective jurisdictions. It may properly be considered as necessary for the continued exercise of the jurisdiction of this Court over the corporation in question, that it should be restrained from taking steps, in a State Court, to put itself out of existence."

In *Wagner vs. Drake*, in the circuit court of the United States for the district of Iowa (31 Fed. Rep., 851), the question raised was as to the power of the court to restrain proceedings in a state court, after the action had been removed to it, and though it was held that the facts of the particular case did not authorize the injunction, the power of the federal court to restrain such proceedings where irreparable injury would follow a refusal of the writ, was fully recognized. In deciding the case the court said: "An injunction in such case by the federal court re-

straining the parties before it from proceeding elsewhere, is no injunction, within the spirit and intent of the statute staying proceedings in a state court, because after removal there is no proceeding left in the state court, and no jurisdiction to be interfered with. If, after removal, a party could continue or renew his litigation in the state court, the whole purpose of the removal might be defeated."

The doctrine of these cases has been affirmed by the supreme court of the United States. In *French, Trustee, vs. Hay* (22 Wall., 250), that court held that the circuit court of the United States for the eastern district of Virginia rightfully enjoined proceedings in a suit in a court of Pennsylvania, founded upon a decree rendered in a suit in a court of Virginia, which had been properly removed to the circuit court. In deciding the case the supreme court, speaking by Mr. Justice Swayne, said: "The prohibition in the Judiciary Act against the granting of injunctions by the courts of the United States touching proceedings in State courts has no application here. The prior jurisdiction of the court below took the case out of the operation of that provision."

In *Dietzsch vs. Hvidekoper* (103 U. S., 494), it appeared that an action of replevin had been commenced in a state court of Illinois, which was removed to the circuit court of the United States for that district. Notwithstanding the removal, a writ for the return of the property was issued by the state court, which the plaintiffs in the replevin suit refused to obey. An action was then brought against them and their sureties on the replevin bond. They thereupon filed a bill in the United States circuit court in which they prayed an injunction to restrain the prosecution of any suit upon the bond. An injunction was issued, and the supreme court held that it was properly granted, observing that "A court of the United States is not

prevented from enforcing its own judgments by the statute which forbids it to grant a writ of injunction to stay proceedings in a State court."

It is essential to the due administration of justice in the federal courts that they have full power to issue all process necessary for the exercise of their jurisdiction, and such power is in explicit terms conferred by statute upon them. When, therefore, jurisdiction over a subject matter has first attached in a federal court, it must be able to issue all such orders and process as may be essential to give effect to that jurisdiction. State courts subsequently taking jurisdiction over the same subject must exercise it in subordination to the determination of the federal court.

We have thus gone over with as much care as we have been able to give, the several objections of counsel to the jurisdiction of the circuit court of the United States to render the decree in the original suit of *Sharon vs. Hill*; and we have no doubt of its complete and paramount jurisdiction over the subject matter of the suit, and to render the decree entered. That decree was reached after an exhaustive examination of the proofs in the case as shown by the elaborate opinions of the judges. Although there are some doctrines announced in the leading opinion to which we do not assent, and to one of which we have already referred, no one, we think, with a clear judgment, unaffected by passion, can read and study its masterly analysis and presentation of the testimony without being convinced that the court had abundant reasons for its conclusions. The learned counsel for the defendants for once, contrary to his general habit, has been led by his zeal beyond the limits of proper discussion in declaring to the court which rendered the decree that it is "an ineffective, inoperative, unenforceable pronunciamiento." Being upon the matters embraced by it, in our judgment, binding and conclusive, it must

be enforced in all its parts until the only tribunal in this country which can control and stay it—the supreme court of the United States—has determined otherwise. That tribunal is lifted far above all prejudices, passions and attachments, and will adjudge without any such influences what is just and right in the controversy, so far as that is attainable in our system of government.

We have endeavored to discuss the questions presented purely as legal questions without reference to or comment upon the evidence in the cases; yet as counsel have referred to the different manner in which the testimony was given in the two courts—that in the state court by the witnesses in open court, and that in the federal court by depositions before an examiner in chancery—as though for this reason the conclusions of the state court were entitled to greater consideration than those of the federal court: we have read with care the opinion of the state court. The testimony is such that weight is to be attached to it more from its character and intrinsic nature than from the manner in which it was given. The great question in both was the genuineness of the alleged marriage contract—the holder, Sarah Althea, affirming its genuineness, and the alleged signer, William Sharon, asseverating its forgery. Both have accompanied their statements with their oaths. Both have not testified to the truth; there is falsehood on one side or the other. The burden of proof was on her, and the learned judge of the state court often speaks of testimony offered by her in terms of condemnation. In one passage he says of certain testimony given by her: “This is unimportant, except that it shows a disposition which crops out occasionally in her testimony to misstate or deny facts when she deems it of advantage to her case.” Again, with respect to alleged introductions of her to several persons as the wife of Sharon, the judge says: “Plaintiff’s testi-



mony as to these occasions is directly contradicted ; and in my judgment her testimony as to these matters is wilfully false." As to her testimony that she advanced to Sharon in the early part of her acquaintance \$7,500, the judge says: "This claim, in my judgment, is utterly unfounded. No such advance was ever made." Again, the court said: "The plaintiff claims that the defendant wrote her notes at different times after her expulsion from the Grand Hotel. If such notes were written, it seems strange that they have not been preserved and produced in evidence. I do not believe she received any such notes." Again, a document purporting to be signed by Sharon was produced by her, explaining why she was sent from the Grand Hotel in the fall of 1881, and also acknowledging that the money he was then paying her was part of \$7,500 she had placed in his hands. The production of the paper for inspection was vigorously resisted, but it was finally produced. At a subsequent period, when called for it could not be found. Of this paper the judge said: "Among the objections suggested to this paper as appearing on its face, was one made by counsel that the signature was evidently a forgery. The matters recited in the paper are, in my judgment, at variance with the facts which it purports to recite. Considering the stubborn manner in which the production of this paper was at first resisted, and the mysterious manner of its disappearance, I am inclined to regard it in the light of one of the fabrications constructed for the purpose of bolstering up plaintiff's case. I can view the paper in no other light than as a fabrication."

There are several other equally significant and pointed passages expressive of the character of the testimony produced in support of her case. Of what she attempted, the judge thus speaks: "I am of the opinion that to some extent plaintiff has availed herself of the aid of false testimony for the purpose of giving her

case a better appearance in the eyes of the court ; but sometimes parties have been known to resort to false testimony, where, in their judgment, it would assist them in prosecuting a lawful claim. As I understand the facts of this case, that was done in this instance." Notwithstanding this characterization of parts of her testimony, the genuineness of the alleged marriage contract rests to a great extent upon her testimony. It would seem that the learned judge reached his conclusions without due regard to a principle in the weighing of testimony, as old as the hills, and which ought to be as eternal in the administration of justice, that the presentation knowingly of fabricated papers, or false evidence, to sustain the story of a party, throws discredit upon his whole statement. It is generally deemed equivalent to an admission of the falsity of the whole claim. (*Deering vs. Metcalf*, 74 N. Y., 501, 506; *Chicago City Railway Co. vs. McMahon*, 103 Ill., 485; *Egan vs. Bowker*, 5 Allen, 449; Code of Civil Pro., Sec. 2061; Starkie on Evidence, p. 873.)

We have referred to the opinion of the state judge merely on account of the claim that his conclusions, because he had the witnesses before him, and because of the alleged defective machinery for taking testimony in the federal courts, are entitled to more consideration than the opposite conclusions reached by the federal judges after a most thorough and exhaustive examination.

The judgment of this court is that the demurrers in both cases be overruled; that in the first case the original suit of William Sharon against Sarah Althea Hill, now Sarah Althea Terry, and the proceedings and final decree therein stand revived in the name of Frederick W. Sharon as executor, and against Sarah Althea Terry and David S. Terry, her husband—the said ex-

ecutor being substituted as plaintiff in 'the place of William Sharon, deceased, and the said David S. Terry being joined as defendant with his wife, so as to give to the said plaintiff executor as aforesaid the full benefit, rights and protection of said final decree, and full power to enforce the same against the said defendants at all times, and in all places and in all particulars. In the second case, that of Francis G. Newlands, trustee, and others, beneficiaries under the trust deed, the defendants will have leave to answer until the next rule day.

Appropriate orders in conformity with this decision will be entered in the respective cases.

We concur: SAWYER, Circuit Judge.  
SABIN, District Judge.









# The Terry Contempt.

---

On September 3, 1888, while the Judges of the United States Circuit Court, holden at San Francisco, were delivering their opinion in the cases of Frederick W. Sharon against David S. Terry and wife, and Francis G. Newlands and others against the same defendants, Mrs. Terry, one of the defendants, interrupted Mr. Justice Field, who was reading the opinion, and was guilty of such misbehavior in the presence of the Court that the Marshal was ordered by the Court to remove her from the court-room. The Marshal proceeded to execute this order, when he was assaulted and beaten in the presence of the Court by Terry. The Deputy Marshals and citizens present promptly laid hold of Terry and restrained further violence until Mrs. Terry was taken from the court-room. When this was done, Terry was allowed to leave the court-room. As he was doing so, he drew a bowie-knife from his bosom, when he was again seized by deputy marshals and others, in the corridor of the court building adjoining the court-room, and in the struggle ensuing Terry's knife was taken from him.

The Judges holding the Court were Hon. Stephen J. Field, Circuit Justice; Hon. Lorenzo Sawyer, Circuit Judge, and Hon. George M. Sabin, District Judge. Hon. Ogden Hoffman was present sitting with the Judges, but merely as a spectator.

As soon as the disturbance had ceased, the Judges proceeded with the delivery of their opinion, after which, orders were made adjudging Mr. and Mrs. Terry guilty of contempt and directing their imprisonment as a punishment therefor.

Subsequently, on September 12, 1888, a petition was presented to the Court by Mr. Terry requesting a revocation of the order committing him to prison, and on September 17, 1888, an opinion was delivered by Mr. Justice Field, concurred in by Judges Sawyer and Sabin, denying this petition. With the petition and opinion were filed affidavits of the officers of the court and other eye-witnesses detailing the facts of this occurrence.

The following pages contain copies of the orders adjudging Mr. and Mrs. Terry guilty of contempt and awarding punishment therefor, the petition of Mr. Terry for clemency, the opinion of the Court denying this petition and the affi-



avits filed with the petition and opinion, also cuts showing the actual size of the knife drawn by Terry, and of a pistol which Mrs. Terry had with her in court, which she carried in a satchel as described in the affidavits.



## Order Committing D. S. Terry for Contempt.

At a stated term, to wit: the July term, A. D. 1888, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern District of California, held at the court-room in the City and County of San Francisco, on Monday, the 3d day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Present—The Honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States; the Honorable Lorenzo Sawyer, Circuit Judge; the Honorable George M. Sabin, United States District Judge, District of Nevada.

IN THE MATTER OF CONTEMPT }  
                                   OF }  
 DAVID S. TERRY. }

Whereas, on this 3d day of September, 1888, in open Court, and in the presence of the Judges thereof, to wit: Hon. Stephen J. Field, Circuit Justice, presiding; Hon. Lorenzo Sawyer, Circuit Judge, and Hon. George M. Sabin, District Judge, during the session of said Court and while said Court was engaged in its regular business, hearing and determining causes pending before it, one Sarah Althea Terry was guilty of misbehavior in the presence and hearing of said Court; and whereas, said Court thereupon duly and lawfully ordered the United States Marshal, J. C. Franks, who was then present, to remove the said Sarah Althea Terry from the court-room; and whereas, the said United States Marshal then and there attempted to enforce said order, and then and there was resisted by one David S. Terry, an attorney

of this Court, who, while the said Marshal was attempting to execute said order, in the presence of the Court, assaulted the said United States Marshal, and then and there beat him, the said Marshal, and then and there wrongfully and unlawfully assaulted said Marshal with a deadly weapon, with intent to obstruct the administration of justice and to resist such United States Marshal, and the execution of the said order; and whereas, the said David S. Terry was guilty of a contempt of this Court by misbehavior in its presence, and by a forcible resistance in the presence of the Court to a lawful order thereof in the manner aforesaid:

Now, therefore, be it ordered and adjudged by this Court, that the said David S. Terry, by reason of said acts, was and is guilty of contempt of the authority of this Court, committed in its presence on this the 3d day of September, 1888. And it is further ordered that said David S. Terry be punished for said contempt by imprisonment for the term of six months. And it is further ordered that this judgment be executed by imprisonment of the said David S. Terry in the County Jail of the County of Alameda, in the State of California, until the further order of this Court, but not to exceed said term of six months.

And it is further ordered that a certified copy of this order, under the seal of the Court, be process and warrant for executing this order.

---

### **Order Committing Sarah Althea Terry for Contempt.**

At a stated term, to-wit, the July term, A. D. 1888, of the Circuit Court of the United States of America, of the Ninth Judicial Circuit, in and for the Northern



District of California, held at the court-room in the City and County of San Francisco, on Monday, the 3d day of September, in the year of our Lord one thousand eight hundred and eighty-eight.

Present: The Honorable Stephen J. Field, Associate Justice of the Supreme Court of the United States; the Honorable Lorenzo Sawyer, Circuit Judge; the Honorable George M. Sabin, United States District Judge, District of Nevada.

IN THE MATTER OF THE CONTEMPT }  
   OF }  
 SARAH ALTHEA TERRY. }

Whereas, on this 3d day of September, 1888, in open Court, and in the presence of the Judges thereof, to-wit: Hon. Stephen J. Field, Circuit Justice, presiding; Hon. Lorenzo Sawyer, Circuit Judge, and Hon. George M. Sabin, District Judge, during the session of said Court, and while said Court was engaged in its regular business hearing and determining causes pending before it, the said Sarah Althea Terry interrupted the proceedings of said Court by loud and boisterous language, and was thereupon by said Court ordered to be silent and to take her seat, and refused so to do, but continued to use boisterous and insulting language, and asked the presiding Justice "how much he was paid for his opinion," and then and there used towards the Court and in its presence other contemptuous and scandalous language; and, whereas, the said Court then and there made an order that the said United States Marshal remove the said Sarah Althea Terry from the court-room of said Court, which order the said Marshal then and there attempted to execute, and which said order made in her presence and hearing, the said Sarah Althea Terry resisted then and there in the presence of the Court; and, whereas, the said Sarah Althea Terry was thereby guilty of a con-

tempt of this Court by misbehavior and in its presence and by a resistance in its presence to a lawful order thereof, and in the manner aforesaid:

Now, therefore, be it ordered and adjudged by this Court that the said Sarah Althea Terry, by reason of the acts aforesaid, was, and is guilty of contempt of the authority of this Court, committed in its presence on this 3d day of September, 1888; and it is further ordered that Sarah Althea Terry be punished for said contempt by imprisonment for the term of thirty days; and it is further ordered that this judgment be executed by the imprisonment of the said Sarah Althea Terry in the County Jail of the County of Alameda, in said State of California, until the further order of this Court, but not to exceed said term of thirty days.

And it is further ordered that a certified copy of this order under the seal of the Court be the process and warrant for executing this order.

---

### Petition of D. S. Terry.

*In the Circuit Court of the United States, Ninth Circuit,  
Northern District of California.*

IN THE MATTER OF CONTEMPT }  
OF  
DAVID S. TERRY. }

TO THE HONORABLE CIRCUIT COURT AFORESAID :

The petition of David S. Terry respectfully represents :

That in all the matters and transactions occurring in the said Court on the 3d day of September, inst., upon which the order in this matter was based, your petitioner

did not intend to say or do anything disrespectful to said Court, or to the Judges thereof, or to any one of them.

That when petitioner's wife, the said Sarah A. Terry, first arose from her seat and before she uttered a word, your petitioner used every effort in his power to cause her to resume her seat and remain quiet, and he did nothing to encourage her in her acts of indiscretion; when this Court made the order that petitioner's wife be removed from the court-room, your petitioner arose from his seat with the purpose and intention of himself removing her from the court-room quietly and peaceably, and he had no intention or design of obstructing or preventing the execution of the said order of the Court; that he never struck or offered to strike the United States Marshal until the said Marshal had assaulted himself, and had in his presence violently, and as he believed, unnecessarily assaulted petitioner's wife.

Your petitioner most solemnly avers that he neither drew or attempted to draw any deadly weapon of any kind whatever in said court-room, and that he did not assault or attempt to assault the United States Marshal with any deadly weapon in said court-room or elsewhere. And in this connection, he respectfully represents that after he had left said court-room, he heard loud talking in one of the rooms of the United States Marshal, and among the voices proceeding therefrom he recognized that of his wife, and he thereupon attempted to force his way into said room through the main office of the United States Marshal; the door of this room was blocked with such a crowd of men that the door could not be closed; that your petitioner then for the first time drew from inside his vest a small sheath-knife,\* at the same time saying to those stand-

---

\* At the end of this pamphlet is a cut showing the actual size of the knife described in the petition as "a small sheath-knife."

ing in his way in said door that he did not want to hurt anyone; that all he wanted was to get in the room where his wife was. The crowd then parted, and your petitioner entered the doorway, and there saw a United States Deputy Marshal with a revolver in his hand pointed to the ceiling of the room. Some one then said, "Let him in, if he will give up his knife," and your petitioner immediately released hold of the knife to some one standing by.

In none of these transactions did your petitioner have the slightest idea of showing any disrespect to this honorable Court, or any of the Judges thereof.

That he lost his temper, he respectfully submits was a natural consequence of himself being assaulted when he was making an honest effort to peaceably and quietly enforce the order of the Court so as to avoid a scandalous scene, and of his seeing his wife so unnecessarily assaulted in his presence.

Wherefore, your petitioner respectfully requests that this honorable Court may in the light of the facts herein stated revoke the order made herein committing him to prison for six months.

And your petitioner will ever pray, etc.

Dated: September 12th, 1888.

State of California, County of Alameda, ss.—David S. Terry, being duly sworn, deposes and says, that the facts set forth in the foregoing petition are true, to the best of his knowledge and belief.

D. S. TERRY.

Subscribed and sworn to before me, this 12th day of September, 1888.

[SEAL]

GEORGE M. SHAW,  
Notary Public.

Endorsed: Filed September 17, 1888.

L. S. B. SAWYER, Clerk.



## Opinion of the Court.

*In the Circuit Court of the United States of the Ninth  
Judicial Circuit,*

In and for the Northern District of California.

IN THE MATTER OF THE CONTEMPT }  
OF }  
DAVID S. TERRY.

MR. JUSTICE FIELD delivered the opinion of the court on the petition.

We have received a petition from David S. Terry praying that the order of this Court committing him to prison for contempt may be revoked.

To pass intelligibly upon the petition, a brief statement of the circumstances under which the order was made will be necessary. On the 3d of September, instant, the cases of Frederick W. Sharon, as executor against David S. Terry and Sarah Althea Terry, his wife, and of Francis G. Newlands, as trustee, and others against the same parties, were before this Court on demurrers to bills to revive and carry into execution the final decree in the suit of William Sharon vs. Sarah Althea Hill, and were decided on that day. Shortly before the Court opened the defendants came into the court-room and took their seats within the bar at the table next to the Clerk's desk, and almost immediately in front of the Judges, the defendant David S. Terry being at the time armed with a bowie-knife concealed on his person, and the defendant Sarah Althea, his wife, carrying in her hand a small satchel which contained a revolver of six chambers, five of which were loaded. The court at the time was held by the Justice of the Supreme Court of the United States assigned to this circuit, who was

presiding; the United States Circuit Judge of this circuit, and the United States District Judge of the District of Nevada, called to this district to assist in holding the Circuit Court. Almost immediately after the opening of the court the presiding Justice commenced reading its opinion in the cases mentioned, but had not read more than one-fourth of it when the defendant, Sarah Althea Terry, arose from her seat and asked him, in an excited manner, whether he was going to order her to give up the marriage contract to be cancelled. The presiding Justice replied, "Be seated, madam." She repeated the question, and was again told to be seated. She then cried out in a violent manner that the Justice had been bought, and wanted to know the price he held himself at; that he had got Newlands' money for his decision, and everybody knew it, or words to that effect. It is impossible to give her exact language. The Judges and parties present differ as to the precise words used, but all concur as to their being of an exceedingly vituperative and insulting character.

The Presiding Justice then directed the Marshal to remove her from the court-room. She immediately exclaimed that she would not go from the room, and that no one could take her from it, or words to that effect.

The Marshal thereupon proceeded towards her to carry out the order for her removal and compel her to leave, when the defendant, David S. Terry, rose from his seat, evidently under great excitement, exclaiming among other things, that "No living man shall touch my wife," or words of that import, and dealt the Marshal a violent blow in his face. He then unbuttoned his coat and thrust his hand under his vest where his bowie-knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he him-

self forced down on his back. The Marshal then removed Mrs. Terry from the court-room. Soon afterwards Mr. Terry was allowed to rise and was accompanied by officers to the door leading to the corridor, on which was the Marshal's office. As he was about leaving the room, or immediately after stepping out of it (and it is immaterial which), he succeeded in drawing his knife, when his arms were seized by a Deputy Marshal and others present, to prevent him from using it, and they were able to wrench it from him only after a violent struggle. The affidavits of officers of the Court and others present, filed herewith, detail the facts.

For their conduct and resistance to the execution of the order of the Court, the defendants, Sarah Althea Terry and David S. Terry, were adjudged guilty of contempt and ordered to be imprisoned, the former for thirty days and the latter for six months.

The commitment of Terry recited the contemptuous conduct of Sarah Althea and the order of the Court directing the Marshal to remove her from the court-room, and that while the Marshal was attempting to execute the order, the said David S. Terry assaulted him in the presence of the Court and beat him; and also that said Terry wrongfully and unlawfully assaulted the Marshal with a deadly weapon, with intent to obstruct the administration of justice.

There were two matters recited for which Terry was adjudged guilty of contempt; first, resisting the Marshal in the execution of the order, and beating him, and second, unlawfully assaulting the Marshal with a deadly weapon.

Section 725 of the Revised Statutes defines the powers of the courts of the United States in matters of contempt. It declares that "the said courts shall have power \* \* \* to punish by fine or imprisonment, at the discretion of the Court, contempts of their

authority: Provided that such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said Court in their official transactions, and the disobedience or resistance by any such officer or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts."

As thus seen, contempts embrace three classes of acts: First, the misbehavior of any person in the presence of the courts, or so near thereto as to obstruct the administration of justice;

Second, the misbehavior of any of the officers of the Court in their official transactions; and

Third, the disobedience or resistance by any such officer or by any party, juror, witness or other person to any lawful writ, process, order, rule, decree, or command of the courts.

The misbehavior of the defendant, David S. Terry, in the presence of the Court, in the court-room, and in the corridor which was near thereto, and in one of which (and it matters not which) he drew his bowie-knife and brandished it with threats against the deputy of the Marshal and others aiding him, is sufficient of itself to justify the punishment imposed. But great as this offense was, the forcible resistance offered to the Marshal in his attempt to execute the order of the Court, and beating him, was a far greater and more serious affair. This resistance and beating of its officer was the highest possible indignity to the Government. When the flag of the country is fired upon and insulted, it is not the injury to the bunting, the linen or silk on which the stars and stripes are stamped, which startles and arouses the country. It is the indignity and insult to the emblem of the nation's



majesty which stirs every heart and makes every patriot eager to resent them. So the forcible resistance to an officer of the United States in the execution of the process, orders and judgments of their courts, is in like manner an indignity and insult to the power and authority of the Government which can neither be overlooked nor extenuated.

The defendant, David S. Terry, now prays the Court to revoke the order committing him. In his petition, he sets forth that in the transactions in the Circuit Court on the 3d instant, upon which his commitment was made, he did not intend to say or do anything disrespectful to the Court or to the Judges thereof, or to any one of them. He alleges that when his wife first arose from her seat and before she had uttered a word, he used every effort in his power to cause her to resume her seat and to remain quiet, and that he did nothing to encourage her in what he terms "her acts of indiscretion."

That when the order for her removal from the court-room was made, he rose from his seat for the purpose of removing her himself, quietly and peaceably, and had no intention of disturbing or preventing the execution of the order of the Court; that he never struck nor offered to strike the Marshal until the Marshal had assaulted him, and had, in his presence, violently, and as he believed, unnecessarily, assaulted his wife.

That he neither drew, nor attempted to draw, any deadly weapon of any kind in the court-room, and that he did not assault or attempt to assault the United States Marshal with any deadly weapon in the court-room or elsewhere.

He represents that after he had left the court-room he heard loud talking in one of the rooms of the Marshal, and among the voices proceeding therefrom he recognized that of his wife; that he then attempted to force his way into that room, and finding it barred

by a crowd of men, so that the door could not be closed, he, for the first time, drew from inside his vest a small sheath knife, at the same time saying to the crowd standing in his way, that he did not want to hurt any one, but that all he wanted was to get into the room where his wife was; that the crowd then parted, and he entered the doorway where some one said, "Let him in, if he will give up his knife," and he then immediately gave up his knife.

The petitioner further alleges that in none of these transactions did he have the slightest idea of showing any disrespect to the Court or to any of its Judges, and that the fact that he lost his temper was a natural consequence of his being himself assaulted, when he was making an honest effort to enforce the order of the Court and of his seeing his wife assaulted in his presence.

Upon this statement he asks the revocation of the order committing him to prison.

We have read this petition with great surprise at its omissions and mistatements. As to what occurred under our immediate observation, its statement does not accord with the facts as we saw them; as to what occurred at the further end of the room, and in the corridor, its statement is directly opposed to the concurring accounts of the officers of the Court and parties present, whose position was such as to preclude error in their observations. According to the sworn statement of the Marshal, which accords with our own observation, so far from having struck or assaulted Terry, he had not even laid his hands upon him when the violent blow in the face was received. And it is clearly beyond controversy that Terry never voluntarily surrendered his bowie-knife, and that it was wrenched from him only after a violent struggle.

We can only account for his misstatement of facts as they were seen by numerous witnesses, by supposing

that he was in such a rage at the time that he lost command of himself, and does not well remember what he then did, or what he then said. Some judgment as to the weight this statement should receive, independently of the incontrovertible facts at variance with it, may be formed from his speaking of the deadly bowie-knife he drew as a small sheath-knife,\* and of the shameless language and conduct of his wife as "her acts of indiscretion."

No one can believe that he thrust his hand under his vest where his bowie-knife was carried without intending to draw it. To believe that he placed his right hand there for any other purpose—such as to rest it after the fatigue of his violent blow in the Marshal's face, or to smooth down his ruffled linen—would be childish credulity.

But even his own statement admits the assaulting of the Marshal who was endeavoring to enforce the order of the Court, and his subsequently drawing a knife to force his way into the room where the Marshal had removed his wife. Yet he offers no apology for his conduct, expresses no regret for what he did, and makes no reference to his violent and vituperative language against the Judges and officers of the court while under arrest, which is detailed in the affidavits filed.

There is nothing in his petition which would justify any remission of the imprisonment. The law imputes an intent to accomplish the natural result of one's acts, and when those acts are of a criminal nature it will not accept, against such implication, the denial of the transgressor. No one would be safe if a denial of a wrongful or criminal intent would suffice to release the violator of law from the punishment due to his offenses.

---

\* See cut showing actual size of this knife at end of pamphlet.

Why did the petitioner come into Court with a deadly weapon concealed on his person? He knew that as a citizen he was violating the law which forbids the carrying of concealed weapons, and as an officer of the Court—and all attorneys are such officers—was committing an outrage upon professional propriety, and rendering himself liable to be disbarred. (*Sharon vs. Hill*, 11 Sawyer, 122.)

Therefore, considering the enormity of the offenses committed and the position the petitioner once held in this State, which aggravates them to a degree not imputable to the generality of offenders, the Court, with a proper regard to its own dignity, the majesty of the law, and the necessity of impressing upon all men that forcible resistance to the lawful orders of the courts of the United States will not go unpunished, however high the offending parties, cannot grant the prayer of the petitioner; and it is accordingly denied.

We concur:      SAWYER, Circuit Judge,  
                             SABIN, District Judge.

THE AFFIDAVITS REFERRED TO IN THE FOREGOING OPINION.

### Affidavit of J. C. Franks.

STATE OF CALIFORNIA,      }  
City and County of San Francisco, } ss.

I, J. C. FRANKS, being duly sworn, depose and say:

That I am and have been since March, 1886, the United States Marshal for the Northern District of California. That on the 3rd day of September, 1888, I was standing where I usually stand in the court-room, on the west side of the railing enclosing the place where the clerk of the court sits, while Judge Field was reading his decision in the case of *Sharon vs. Terry*, Judge



Terry and his wife, Mrs. Terry, sat at the large table for attorneys in front of the railing around the clerk's desk, they being to my left, Mr. Terry being farther away from me. Judge Field had read for a few minutes when Mrs. Terry stood up, interrupting the Court, said, among other things, "You have been paid for this decision." Judge Field then ordered her to keep her seat, but she continued, saying, "How much did Newlands pay you?" Then Judge Field, looking towards me, said, "Mr. Marshal, remove that woman from the court-room." Mrs. Terry said in a very defiant manner, "You cannot take me from the Court." I immediately stepped to my left to execute the order, passing Judge Terry to where Mrs. Terry was standing. Mrs. Terry immediately sprang at me, striking me in my face with both her hands, saying, "You dirty scrub, you dare not remove me from this court-room." Mrs. Terry made this assault upon me before I had touched her. I immediately moved to take hold of her, when Judge Terry threw himself in my way, getting in front of me, and, unbuttoning his coat, said, in the most defiant and threatening manner, "No man shall touch my wife; get a written order," or words to that effect. I put out my hand towards him, saying, "Judge, stand back; no written order is required;" and just as I was taking hold of Mrs. Terry's arm, Judge Terry assaulted me, striking me a hard blow in my mouth with his right fist, breaking one of my teeth, and I immediately let his wife go, and pushed him back. He then put his right hand in his bosom, while at the same time Deputy Farish, Detective Finnegass, and other citizens, caught him by the arms and pulled him down in his chair. I caught hold of Mrs. Terry again, Mr. N. R. Harris, one of my deputies, coming to my assistance, and we took her out of the court-room into my office, she resisting, scratching and striking me all the time, using violent

language, denouncing and threatening the Judges and myself, claiming that I had stolen her diamonds and bracelets from her wrists, and calling several times to Porter Ashe to give her her satchel, I, during the whole time using no more force than was necessary, considering the resistance made by her, addressing her as politely as possible. When we got her into the inner room of my office, I left her in charge of Mr. Harris, went into the main office, saw a body of men scuffling at the door, heard Deputy Marshal Taggart say, "If you attempt to come in here with that knife, I will blow your brains out." I said, "What, has he a knife?" Deputy Farish answered and said, "He had a knife, but we took it away." I then took hold of Judge Terry, and with assistance of others, pulled him in the main office and shut the door. I had him and his wife placed in my private office in charge of Deputy Marshals Harris, Donnelly and Taggart. I then went into the court-room, and when I had been in there but a short time, Mr. Farish came in and said, "Mrs. Terry wants her satchel, which Porter Ashe has." I went into the corridor and found Mr. Ashe with the satchel. I requested him to hand it to me; at first he refused, saying it was Mrs. Terry's private property, and he was going to deliver it to her. I told him she was my prisoner, and her effects should be in my custody, and if he did not give the satchel up I would place him under arrest. He then gave it to me, and I told him to come with me into my office, and I would open it in his presence. He did so, and I opened it and took a pistol therefrom, a self-cocking 41 calibre Colt's pistol\*, with five chambers loaded, the sixth being empty; after which I delivered the satchel to Mrs. Terry. Mr. Ashe then said he did not intend to give the satchel to her with the pistol in it. I append hereto a photograph of the bowie-knife taken

---

\* See cut at end of pamphlet, showing actual size of this pistol.

from the hands of Judge Terry by a citizen, with the assistance of my officers, and handed to me by the citizen, and also a photograph of the pistol taken from Mrs. Terry's satchel, both photographs exhibiting the actual size of these weapons. All this occurred in the Appraisers' Building, corner of Washington and Sansome streets, in the presence of and within the hearing of the United States Judges, while they were delivering the decision.

I noticed Judge Terry and his wife during the reading of the opinion, and as some points were being decided against them, I carefully observed them before I commenced to remove Mrs. Terry from the court-room, and there was no word or act that I observed on the part of Judge Terry to restrain his wife in her conduct, or to take her from the court-room, or to assist me in doing so. On the contrary: Judge Terry resisted me with violence as I have stated.

After Judge Terry was placed in my inner office, as I have above stated, he used very abusive language concerning the Judges, referring to Judge Sawyer as "that corrupt son of a bitch," and also saying, "Tell that bald-headed old son of a bitch Field that I want to go to lunch," and after the order was made committing him six months for contempt, Judge Terry said: "Field thinks that when I get out, he will be away, but I will meet him when he comes back next year, and it will not be a very pleasant meeting for him." Mrs. Terry said several times that she would kill both Judges Field and Sawyer.

J. C. FRANKS.

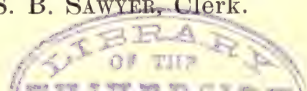
Subscribed and sworn to before me, this 17 day of September, A. D. 1888.

F. D. MONCKTON,

Commissioner U. S. Circuit Court, Northern District of California.

Endorsed: Filed Sept. 17, 1888.

L. S. B. SAWYER, Clerk.



## Affidavit of Henry Finnegass.

STATE OF CALIFORNIA,  
City and County of San Francisco, } ss.

HENRY FINNEGASS, being first duly sworn, deposes and says:

That he is a citizen of the United States, over 45 years of age; that he was agent of the Secret Service Division of the United States Treasury Department for the Pacific Coast from March 1st, 1871, to May 1st, 1888, and during most of said time has also acted as a Deputy United States Marshal for the District of California;

That he was present in the court-room of the United States Circuit Court in the Appraiser's Building, corner of Sansome and Washington streets, in the city and county of San Francisco, on September 3rd, 1888, when the Judges were delivering their opinion in the cases of Sharon vs. Terry et al., and Newlands et al. vs. Terry et al.

The opinion of the Court was being delivered by Judge Field, and when he had proceeded with the reading of the opinion for twenty minutes, commencing at 11 o'clock, he was interrupted by Mrs. Terry rising to her feet and saying, "Judge, are you going to take the responsibility of ordering me to deliver up that marriage contract?" Judge Field immediately said, "Take your seat, madam." Mrs. Terry retorted, "How much did you get for that decision? You have been bought by Newlands." The Judge then said, "Marshal, remove that woman from the court-room, and the Court will deal with her hereafter." During this time Mrs. Terry was standing almost immediately in front of Judge Field, at the table near the railing outside of the Clerk's desk. When Judge



Field ordered the Marshal to remove Mrs. Terry from the court-room, she sat down, saying in a loud voice and indignant and insulting manner, "I won't go out and you can't put me out," and other words to that effect. During this time Marshal Franks was standing at the west end of the railing around the Clerk's desk, and about ten feet distant from where Mrs. Terry was standing and sitting. Judge Terry was sitting beside Mrs. Terry at her right hand, and between Mrs. Terry and the Marshal. Immediately upon Judge Field directing the Marshal to remove Mrs. Terry from the court-room, the Marshal walked around behind Judge Terry towards Mrs. Terry. While the Marshal was thus proceeding, Judge Terry rose to his feet, saying, as the Marshal passed him, "Don't touch my wife; get a written order." The Marshal, in effect, replied that he had order enough. Then Judge Terry said, "No God damn man shall touch my wife;" and he tried to get between the Marshal and his wife. The Marshal went to take hold of Mrs. Terry's arm, when Judge Terry drew back and struck him with his right fist a severe blow on the face. The Marshal then pushed Judge Terry with his hands. Then Judge Terry unbuttoned his coat and thrust his right hand into his bosom through the open place of his vest. When I saw him make this motion I sprang toward him, and caught him by the right arm and pulled his hand away from his vest and pulled him back on a chair. Two other men took hold of him at the same time and we held him down. He was swearing all the time, saying, "God damn you, let me up; you sons of bitches, let me up;" and other exclamations of that character.

However, we held him there until his wife was taken forcibly out of the room by Marshal Franks and his assistant. Then we let Terry up and I went up with him to near the swinging doors connecting the

court-room with the passageway, leading into the corridor. About five feet from the swinging doors and in the court-room I released my hold of Judge Terry's right arm and let go of him, and he went through the door and I held one side of the door open with my left hand, and this door was not closed until Judge Terry had drawn his bowie-knife, and was brandishing it in the passageway leading to the corridor. When he got a few feet from the swinging doors into the passageway, I heard some one say, "Look out, he's got a knife." I let go the swinging door and ran out, and caught him in the said passageway by the right arm in which he held his knife, and at the same instant a Deputy Marshal by the name of Farish, caught hold of Judge Terry. He violently resisted us, and we struggled from the passageway into the corridor and across the corridor into the door leading into the Marshal's office. During this time, Judge Terry shouted loudly, using such exclamations as "Let go, let go, you sons of bitches; I will cut you into pieces; I will go to my wife." We struggled into the space before the counter in the Marshal's office, where we took Judge Terry's knife from him. I loosed some of his fingers and Deputy Marshal Farish loosed some, and a man standing by pulled the knife from Judge Terry's hand. The knife, including the handle, is  $9\frac{1}{4}$  inches long, the blade being five inches long, having a sharp point, and is what is commonly called a "bowie-knife." Immediately after this was done Marshal Franks came out from his inner office, where he had placed Mrs. Terry, and said, "Has he got a knife?" Deputy Farish replied, "He did have one, but it has been taken away from him." Then the Marshal allowed Judge Terry to go in and join his wife in the Marshal's inner office, and he was there detained. I went back into the court-room and

remained during the reading of the opinion. The reading was finished about half -past 12 o'clock.

Terry's conduct throughout this affair was most violent; he acted like a demon, and all the time while in the corridor and before the counter of the Marshal's office, he used loud and violent language, which could be plainly heard in the court-room, and, in fact throughout the building. Mrs. Terry resisted with all her power the efforts of the Marshal in taking her from the court-room, and he was compelled to remove her forcibly. While being removed she screamed and shouted her abuse of the Judges, saying they had been bought and so forth, and also abused Marshal Franks, calling him a hireling, paid to do his dirty work, and words to that effect.

HENRY FINNEGASS.

Subscribed and sworn to before me, this 13th day of September, A. D. 1888.

F. D. MONCKTON,

Commissioner United States Circuit Court,  
Northern District of California.

Endorsed: Filed Sept. 17, 1888.

L. S. B. SAWYER, Clerk.

### Affidavit of A. L. Farish.

STATE OF CALIFORNIA, }  
City and County of San Francisco, } ss.

I, A. L. FARISH, being duly sworn, depose and say:

That I am, and have been since January 1, 1888, Chief Deputy United States Marshal for the Northern District of California. That on the 3rd day of September, 1888, while acting in such capacity, I went into the court-room of the United States Circuit Court, just before Judge Field commenced reading the de-

cision in the case of "Sharon vs. Terry." While the decision was being read, I stood behind of and leaning on the back of the chair in which Mr. Miller, an attorney, was seated, on the western end of the attorneys' table in front of the Judge's bench. I had listened to the reading for a short time, when Mrs. Terry, who was sitting at the north side of the table, to the left of her husband, stood up and interrupted the Court with some remark which I did not fully understand. Judge Field said, with a slight motion of his hand, "Sit down, Madam." She did not sit down, but kept on talking loudly, among other things saying, "How much were you paid for that decision?" Judge Field, turning toward the Marshal, said, "Marshal, remove that woman from the court-room." The Marshal passed back of me and around the corner of the table, close to where Mrs. Terry was standing. Judge Terry jumping up put himself in the way of the Marshal, saying, "Don't touch my wife; get a written order." I heard the Marshal say, "No written order is required." I then saw Judge Terry hit the Marshal, striking him in the face, resisting him and attempting to grapple with him. I, having passed around the corner of the table, caught Judge Terry, and with some assistance from Mr. Finnegass and some other persons, forced him down in his chair, he exclaiming, "Let me go, you damn fools, I want to go to my wife; I know what I am about." After Mr. Franks had gone out with Mrs. Terry, we released our hold of him, and he rushed out of the court-room. I followed close after him, and in passing through the passageway leading from the court-room into the corridor of the court building, I noticed he had a bowie-knife in his hand. I grappled with him and caught his hand, Detective Finnegass seizing him at the same time. He struggled and tried to get his hands free, swearing and threatening all the time. We struggled together till we got



to the outer door leading into the Marshal's rooms, when Judge Terry getting his knife into his left hand, which was disengaged, (I and others having hold of his right), raised it above our heads, and with some expression I could not exactly understand said, in effect, "I will cut you in pieces." I jumped back, and as he turned to go in the office, I cried out to shut the door, at the same time catching his arm, and with the assistance of Mr. Finnegass and another party, a stranger to me, we took the knife from him just as he was attempting to go in the inner door. I heard the Marshal say, "Has he a knife?" when I said, "He did have a knife, but he has not got it now. We took it from him." Judge Terry was then pulled in by the Marshal and deputies into the main room and put under arrest. I went back into the court-room, Mr. Franks following shortly afterwards; I then returned to the Marshal's office. Deputy Taggart coming out of the private office of the Marshal, where Judge Terry and his wife were, said, "Mr. Farish, Mrs. Terry wants her satchel." I told him to tell her to wait a few minutes and she could have it. I then looked around for it, when some one told me Porter Ashe had it. Mr. Ashe was told she wanted it, but I told Detective Finnegass not to let him take it in until the Marshal had examined it. I then went up to Mr. Franks, who was standing near the Judge's bench, and told him about the satchel, heard him tell Mr. Ashe that he would arrest him if he did not surrender the satchel to him. When he gave it up Mr. Franks said, "Come into my office and I will open this satchel in your presence," which he did, taking a pistol therefrom, which I took and put in the vault of the office. Marshal Franks then went into the room, where Mr. Terry was, with the satchel.

Although I noticed Judge Terry closely during this affair, I did not observe any act or word on his part to

restrain Mrs. Terry after the order was made to remove Mrs. Terry in what she was doing, or to have her go from the court-room; on the contrary, Judge Terry resisted the Marshal, as I have stated. The Marshal, so far as I could see, treated Mrs. Terry in every manner and respect, politely and courteously.

A. L. FARISH.

Subscribed and sworn to before me, this 14th day of September, A. D. 1888. F. D. MONCKTON,

Commissioner United States Circuit Court, Northern District of California.

Endorsed: Filed Sept. 17, 1888.

L. S. B. SAWYER, Clerk.

---

### Affidavit of N. R. Harris.

STATE OF CALIFORNIA,                    }  
City and County of San Francisco, } ss.

I, N. R. HARRIS, being first duly sworn, depose and say:

That I am and have been since May, 1888, the Secret Service Agent of the Treasury Department at San Francisco, California, and Deputy United States Marshal.

That on the 3rd day of September, A. D. 1888, I was standing in the United States Circuit court-room during the delivery of his Honor Justice Field's opinion in the suit of Sharon vs. Terry. After about twenty minutes had been consumed in its delivery, I saw Mrs. Sarah Althea Terry arise from her seat directly in front of the Judge and interrupt him, saying in a loud and angry manner, "Judge Field, do you intend to decide that I must give up my marriage contract? Everybody knows you were sent out here by the Newlands to make this decision; how much did they pay

you for it?" Judge Field commanded her to sit down two or three times, she continuing all the time to use loud and insulting language to the Court. Judge Field ordered the Marshal to remove her from the court-room. The Marshal went promptly to her side, and was confronted there by her husband, David S. Terry, who resisted him in the execution of the order, saying, "Don't lay your hands on my wife, you have no order yet; get a written order," or words to that effect, and shoved against the Marshal. The Marshal pushed him slightly back, and when seemingly about to turn to Mrs. Terry, he struck the Marshal a violent blow with his fist in the face. I went immediately through the crowd of spectators to the assistance of the Marshal. When I reached him, Chief Deputy United States Marshal Farish, Detective Finnegass and others, whom I did not recognize, had grappled with Terry and had him down. I took hold of Mrs. Terry, who was acting in a most violent manner, resisting the Marshal's efforts to remove her, and assisted that officer in removing her from the court-room. She continued to fight all the way out of the court-room, through the hall and into the Marshal's inside office. She struck, scratched and kicked, and all the time used the most insulting and abusive language towards the officers and the Judges.

I saw Mr. Terry in our rear just as we entered the Marshal's office with Mrs. Terry, with a large dirk-knife in his hand; heard him threaten to cut one of the officers who was struggling with him for possession of the knife. At this moment, Deputy United States Marshal Taggart covered Terry with a pistol, and said he would blow his brains out if he used the knife. Having succeeded in forcing Mrs. Terry into the inner office, the Marshal left her in my charge and returned to the door of the main office room to assist in the effort to disarm Mr. Terry. The Marshal, with

the assistance of his deputies, soon returned with Mr. Terry under arrest, and placed him in the room with his wife, and requested me, with the assistance of Deputy Marshal Taggart and Donnelly, to hold them in safe custody until the Court should make further orders in their case.

I was closely observing Judge Terry and his wife when she interrupted Judge Field; saw Mrs. Terry say something to Judge Terry, to which he nodded as if assenting to what she had said. Immediately after this, Mrs. Terry rose to her feet and commenced talking, as I have above stated. Judge Terry did not attempt in any way to stop Mrs. Terry, or prevent her from doing what she did, as I have above stated.

When Mr. Terry entered the room under arrest, he was in a rage, and threatened Judges Field and Sawyer and the Marshal. He said he would "have a meeting later with Judge Field and that it would not be a pleasant one for Judge Field," and denounced Judge Sawyer as a "damned old scoundrel," and more to the same effect.

Mrs. Terry, after entering the inner room of the Marshal's office, and upon the Marshal and myself releasing our hold on her arms, instantly struck the Marshal three blows with her hand in his face, before we could pinion her arms again, and attempted to repeat this action the second time. In the struggle to place her in the office, her bracelets were broken and lost. She denounced the Marshal as a thief; declared that he broke off her bracelets and stole them, together with her valuable diamonds and a large sum of money.

The broken bracelets were found and given to her by the Marshal, together with her other articles, except a 41-caliber Colt's six-shooter, with five chambers loaded with powder and leaden balls, which was handed to me by the Marshal.



Mr. Terry made two attempts to get out of the room and was restrained with much difficulty. He asked by what authority we had him imprisoned. He was informed that he was under arrest for resisting the United States Marshal in the proper discharge of his duties as an officer of the Court. He replied that he would sue him for false imprisonment.

In the afternoon an order came from the Court for his and his wife's imprisonment in the Alameda County Jail, where soon afterward they were taken by the Marshal and myself assisting, and delivered into the custody of the Sheriff.

N. R. HARRIS,

Agent S. S. Division, and Acting Deputy U. S. Marshal.

Subscribed and sworn to before me, this 14 day of September, A. D. 1888.

L. S. B. SAWYER,

Comr. U. S. Cir. Court, Nor. Dist. Cal.

Endorsed: Filed Sept. 17, 1888,

L. S. B. SAWYER, Clerk.

## Affidavit of John Taggart.

STATE OF CALIFORNIA,                    }  
City and County of San Francisco, } ss.

JOHN TAGGART, being first duly sworn, deposes and says:

That I am and have been for about six months a deputy United States Marshal for the Northern District of California.

I was present in the United States court-room on the 3d of September, 1888, when the proceedings of the Court were interrupted by Mrs. Terry and her husband, D. S. Terry. This disturbance occurred

while Mr. Justice Field was reading the opinion of the Court in what is known as the Sharon case. Mrs. Terry rose to her feet while the Judge was reading the opinion, and I heard her say, "Judge Field, you're bought and well paid for that decision ; how big was the sack ?" or words to that effect. I heard the Judge order the Marshal to take Mrs. Terry out of the court-room. She declared she would not be taken out, and refused to go. She resisted with all her strength the efforts of the Marshal in executing the order of the Court. I assisted Marshal Franks in removing Mrs. Terry from where she was standing, and went with him to near the door of the court-room, and then I returned to look after Judge Terry. When Marshal Franks commenced to execute the order of the Court, I saw Judge Terry rise to his feet and draw back to strike the Marshal, but I did not see the blow as I was shoved aside by persons who were attempting to get out of the way. I saw him shove the Marshal and also shove his right hand beneath his vest on the left side, which movement I understood to be an effort to draw a weapon. Upon making this movement he was seized by Mr. Finnegass and Deputy Marshal Farish and others, and forced down upon a chair and there held for a few seconds. After Mrs. Terry had been taken from the court room, Judge Terry was allowed to get up, when he walked rapidly out of the court-room, being followed by Deputy Marshal Farish and Mr. Finnegass and others. As he was walking in the court room towards the door, I saw him again thrust his right hand in his vest, as he had done before, at the time saying in a loud tone, "Get out of my way ; I am going to my wife." Upon hearing and seeing this, I left the court-room rapidly, ahead of Judge Terry, for the purpose of going to the Marshal's room and closing the door and preventing Judge Terry from injuring or assaulting the Marshal, as I felt certain he intended

to do from his movements and words. Upon my arriving at the Marshal's door, I could not close it, owing to the crowd that was present, and upon looking in the direction of the passageway leading from the courtroom door, I saw Judge Terry in the passageway with his knife in his right hand, flourishing it above his head, his arm being at the time held by Deputy Marshal Farish and Mr. Finnegass. They immediately struggled to the Marshal's door where I was, about which time Judge Terry succeeded in putting the knife from his right hand into his left, while holding his hands above his head.

Judge Terry demanded that he be allowed to go to his wife. I told him that if he was disarmed he could go to her; he paid no attention to me, but reasserted in a loud, excited voice, that he would go to his wife, flourishing his knife with his left hand. I then drew my pistol and presented it, telling him not to dare to use the knife, and I told him if he attempted to use it I would shoot him down. At this time he was overpowered by those who were holding him and the knife was taken from him, but he did not give it up until he was compelled to do so by physical force.

After the knife was taken from Judge Terry he was taken into the inner room of the Marshal's office where his wife was. While there he used very profane language; he called Marshal Franks a son of a bitch, and a dirty puppy, and other epithets of like character. I heard these expressions several times. He repeatedly said that Judge Field was paid with Newlands' money and that he would get even on him yet, and that "that old bald-headed son of a bitch Field is not through with me yet."

There was naturally great confusion during this fracas, but I cannot remember exactly all that was said and done, but I have stated the occurrence as nearly

as I can remember it. During the time Mr. Franks was removing Mrs. Terry from the court-room he was not excited, and used no more force than was actually necessary, she resisting as much as she could, and at all times the Marshal addressed her politely and courteously, never replying to her any abusive or discourteous remarks.

JOHN TAGGART.

Subscribed and sworn to before me, this 17 day of September, A. D. 1888.

F. D. MONCKTON,  
Commissioner U. S. Circuit Court, Northern District  
of California.

Endorsed: Filed Sept. 17, 1888.

L. S. B. SAWYER, Clerk.

### Affidavit of Benjamin F. Bohen.

STATE OF CALIFORNIA, }  
City and County of San Francisco, } ss.

BENJAMIN F. BOHEN, being first duly sworn, deposes and says:

That he is and has been for more than ten years last past a member of the police and detective force of the City and County of San Francisco;

That shortly before 11 o'clock on the morning of September 3rd, 1888, Officer Wm. Glennon, also a member of said police force, and myself, were directed by I. W. Lees, Captain of the Detective Police, to go to the court-room of the United States Circuit Court, in the building known as the Appraiser's building, on the northeast corner of Sansome and Washington streets, in San Francisco. In directing us to go, Captain Lees



said that he had just learned that the decision was about to be rendered by the Court in the Sharon case, and if it should be against the Terrys in favor of the Sharon side, that they (the Terrys), might make trouble, and that we should render any assistance that might be needed in preserving the peace. Glennon and I arrived at the court-room just before the Court opened, and we took seats in that part of the court-room allotted to the public and outside of the bar and near the gateway through the railing leading to the bar. When the Court convened Judge Field began reading the decision in the case, and after he had continued for about half an hour, he was interrupted by Mrs. Terry, who rose to her feet and said something about Judge Field. I did not hear what she said, but heard the Judge direct her to take her seat, which she did not do, but continued her talk to the Judge in a very excited manner, when the Judge directed the Marshal to remove Mrs. Terry from the court-room. I saw Marshal Franks start towards Mrs. Terry. In going to her he was obliged to pass by Judge Terry, who was between him and Mrs. Terry. About this time most of the persons in the court-room rose to their feet, and owing to this and the confusion, I was not able to see or hear what occurred between Judge Terry and the Marshal, but after the Marshal had succeeded in removing Mrs. Terry I saw Judge Terry thrown or held back over a chair, by three or four men who were holding him. Judge Terry was thus held in a reclining posture for a few seconds, when he succeeded in getting up, and he started towards the door of the court-room leading into the corridor, being followed by the men who had held him down. While Judge Terry was moving toward the door I saw him fumbling with his right hand under his vest on the left side, apparently attempting to draw a weapon, which

he succeeded in doing about the time he was passing through the door leading from the court-room into the passageway which leads into the corridor of the court building, for I saw Judge Terry just as he was leaving the court-room, and while he was in the passageway with a bowie-knife in his right hand, which he was holding over his head. Just before I saw the knife, I heard some one say, "He has got a knife," when I saw two or three men take hold of Judge Terry and try to control him and get the knife from him. I passed into the bar of the court-room through the gateway, and followed Judge Terry and the men holding him out into the passageway and into the corridor and from there into the entrance to the Marshal's office in front of the counter, and there saw the struggle which ended in the knife being taken from him. Judge Terry did all in his power to keep the knife. When it was taken from him he was taken in the private or inner office of the Marshal where Mrs. Terry had been placed.

Judge Terry's conduct throughout this affair was very excited and infuriated. He repeatedly shouted, "Let me go, damn him, let me go, damn him," and other exclamations of like character, which I inferred had reference to the Marshal who had removed Mrs. Terry.

Mrs. Terry resisted the Marshal with all her strength in his efforts to remove her from the court-room and to place her in his office. She continuously screamed and shouted, but in the confusion I was not able to understand what she said.

From what Captain Lees had said, in directing me to go to the court-room, as above stated, I had been noticing pretty closely the movements and conduct of Judge Terry and his wife; I did not see or hear any act or word on the part of Judge Terry designed to control his wife, or to take her from the court-room, or assist the Marshal in carrying out the order of the

Court; on the contrary, he seemed excited and infuriated towards the Marshal for what he had done.

B. F. BOHEN.

Subscribed and sworn to before me, this 13th day of September, A. D. 1888.

JAMES MASON,  
Notary Public.

[SEAL]

### Affidavit of William Glennon.

STATE OF CALIFORNIA, }  
City and County of San Francisco, } ss.

WILLIAM GLENNON, being first duly sworn, deposes and says:

That I am the William Glennon referred to in the foregoing affidavit of Benjamin F. Bohen, and have been a police officer in the City and County of San Francisco since 1881; that I have read said affidavit and that the statements made therein are true; that I was present with said Bohen through the whole transaction described in said affidavit and am able to corroborate from my own knowledge all the statements made by the said Bohen in said affidavit; that I saw and heard what is stated in said affidavit to have been seen and heard by said Bohen, and I hereby adopt said affidavit as a true and correct account of the acts and conduct of Judge Terry and his wife as they are described in said affidavit.

WILLIAM GLENNON.

Subscribed and sworn to before me, this 14th day of September, A. D. 1888.

[SEAL.] JAMES MASON, Notary Public.

Endorsed: Filed Sept. 17, 1888.

L. S. B. SAWYER, Clerk.

## Affidavit of W. W. Presbury.

SAN FRANCISCO, Sept. 6th, 1888.

I attended, as Deputy United States Marshal, the session of the United States Circuit Court held in San Francisco September 3, 1888. While Mr. Justice Field was reading a decision in what is known as the Sharon case, Mrs. Terry rose from her seat and addressed the Justice in an insulting manner. He at once told her to sit down, which she refused to do, and continued to utter other offensive remarks. The Justice then ordered the U. S. Marshal, there present, to take her from the room. As the Marshal moved toward Mrs. Terry to obey the order, Judge Terry struck him in the face, whereupon Terry was seized by the Marshal and others and thrown to the floor, where he was held for a brief time by deputies and others. While on the floor Terry exclaimed, "You damned fools! What are you trying to do?" Meantime the Marshal and assistants had removed the woman from the court-room. A man who sat upon Mrs. Terry's left interposed to prevent the removal of the latter, and for that purpose approached one of the assistants from behind, and tried to drag him away. I disengaged his hands and threw him off, when he passed around me and made a still further attempt at obstructing the officer, but was again prevented by me from so doing. I have since learned that this man is reputed to be a lawyer named Webster, who lives at Stockton. Judge Terry having been released from the grasp of those who held him, proceeded toward the door, feeling apparently for something within his waistcoat. I stepped to his side and saw that he was drawing from his bosom a large knife, which he fairly exposed just inside of the court-room door.



On emerging from the door he held the knife above his head, saying, "I am going to my wife." I walked beside him until he reached the outside door of the Marshal's office, where his further progress was prevented by Chief Deputy Farish and two or more of the Marshal's deputies, together with Detective Finnegass and others. After a struggle the knife was taken from him and he was permitted to join his wife in the Marshal's room. He remained there until an order was received from the Court committing him and his wife to jail, whereupon they were taken from the building by the Marshal and his deputies. Prior to this a man named Ashe was found to be in possession of Mrs. Terry's satchel. The Marshal opened it in my presence, took from it a revolver contained therein, and restored the satchel to the owner. I found a broken bracelet on the floor of the office, and saw it restored to the owner.

W. W. PRESBURY.

The foregoing statement, written by me, is true, to the best of my knowledge and belief.

W. W. PRESBURY.

Subscribed and sworn to before me, this 15th day of September, 1888.

L. S. B. SAWYER,  
Comr. U. S. Circuit Court, Nor. Dist. Cal.

Endorsed: Filed Sept. 17, 1888.

L. S. B. SAWYER, Clerk.



as Franks approached he said something to him which I did not catch. He, Judge Terry, then struck Franks a blow in the face. He then thrust his right hand into his bosom, when he was immediately seized by several persons about him and was forced down into a chair or upon the floor out of my sight for the moment. Marshal Franks and his assistants then seized Mrs. Terry, who shouted in a loud tone that she would not be removed from the court-room, and who repeatedly called out the name of Judge Field, making loud statements, the purport of which I did not catch. The court-room was a scene of great confusion and, excitement, all the audience standing on their feet, and the large majority rushing, apparently to get away from the scene of the conflict. Mrs. Terry was removed forcibly from the court-room, resisting all the time, after which Judge Terry was released by those holding him, and walked rapidly from the court-room. Loud noises and tumult taking place in the hallway were then heard for some moments in the court-room, but I did not leave the court-room, and therefore have no knowledge of what took place outside.

THOS. B. VAN BUREN.

Subscribed and sworn to before me, this 14th day of September, A. D. 1888.

[SEAL.]

JAMES MASON, Notary Public.

Endorsed: Filed Sept. 17, 1888.

L. S. B. SAWYER, Clerk.

## Affidavit of J. H. Miller.

STATE OF CALIFORNIA,                    }  
City and County of San Francisco, } ss.

J. H. MILLER, being duly sworn, makes oath as follows:

That he is an attorney at law and a member of the law firm Langhorne & Miller of 408 California street, San Francisco, California;

That on the 3rd day of September, 1888, from 11 o'clock A. M. until after 12:30, he was present in the court-room of the Circuit Court of the United States for the Northern District of California, in the new Appraiser's Building, in the City and County of San Francisco, during the reading by his Honor, Mr. Justice Field, of the decision of the Court in the cases of Sharon vs. Terry et al. and Newlands et al. vs. Terry et al., and affiant witnessed the disturbance that then and there occurred;

That when said Court convened at 11 o'clock A. M., affiant was sitting at the extreme end of the table set apart for attorneys, immediately in front of the Judges of said Court, with a collection of books and papers on said table in front of affiant, which had been brought there by him to be used by him in the argument of certain cases on the calendar for that day;

That David S. Terry was on said occasion sitting immediately next to and adjoining affiant, on the left, in front of the said Judges, and Sarah Althea Terry was sitting immediately next to and adjoining said David S. Terry on his left;

That while Mr. Justice Field was reading the decision aforesaid, and during the reading thereof, the said Sarah Althea Terry arose from her seat and interrupted the said reading by crying out in a loud voice,



“Judge Field, do you mean to say I must surrender my marriage contract to be cancelled?” or words to that effect. Thereupon, his Honor, Mr. Justice Field, said, “Sit down, madam;” but she refused to sit down, and flew into a rage, and in a loud and boisterous tone of voice used abusive and disrespectful language to the Court. Affiant would not undertake to give under oath all the exact words used by her, but their substance was a charge that Mr. Justice Field had sold his decision and had been paid and bribed by Mr. Newlands to render the opinion he was then reading, and that everybody knew it. Thereupon, Mr. Justice Field ordered the Marshal to remove her from the court-room.

When the Marshal advanced towards her, David S. Terry jumped from his seat and confronted the Marshal and told him in substance that he should not remove Mrs. Terry without a written order.

The Marshal then took hold of Mrs. Terry, or was preparing to take hold of her, when said David S. Terry assaulted him. Several Deputy Marshals then came to the Marshal’s assistance, and a *melée* occurred, during which said David S. Terry thrust his right hand into his breast underneath his waistcoat with every appearance of attempting to draw a weapon; affiant involuntarily stepped back a couple of paces (having before arisen from his seat), expecting said Terry to draw a weapon, either a revolver or a knife; before said Terry could draw any weapon he was seized on one side by Detective Finnegass, and on the other by some person unknown to affiant, and was pushed backwards towards affiant over a chair on the floor alongside of affiant. In the meanwhile Sarah Althea Terry was forcibly carried from the court-room, fighting, resisting and screaming in a loud voice.

The said David S. Terry was allowed to rise from the floor by the officers who had secured him, and

after arising he walked out of the court-room unmolested.

Affiant afterwards heard loud noises outside of the court-room, but does not know what occurred there except from hearsay, as he remained in the court-room.

J. H. MILLER.

Subscribed and sworn to before me, this 13th day of September, A. D. 1888.

[SEAL.]

ANDREW J. COFFEE,  
Notary Public.

Endorsed: Filed Sept. 17, 1888.

L. S. B. SAWYER, Clerk.

### Affidavit of Alfred Barstow.

STATE OF CALIFORNIA, }  
City and County of San Francisco, } ss.

ALFRED BARSTOW, being first duly sworn, deposes and says:

I was present in the Circuit Court, in said City and County, on the 3rd day of September, 1888, and heard read the decision of the Court in the case of Sharon vs. Terry. My position in the court-room at said time was at the easterly side of the court-room, at the table usually occupied by Deputy Marshal Worth, on which table I sat. During the progress of the reading of the opinion, Mrs. Terry made some remark to the Court, and was ordered to sit down. This she refused to do, and continued her remarks; whereupon the Court ordered the Marshal, Mr. J. C. Franks, to remove her from the court-room. Thereupon the Marshal moved around and behind Mr. David S. Terry, to reach Mrs. Terry. Thereupon Mr. Terry arose from his seat, his left hand raised to the left lapel

of his coat and his right fumbling about the breast of his coat. By the time Mr. Terry became erect, the Marshal grasped, or made a motion to grasp, the arm of Mrs. Terry. At that instant Mr. Terry withdrew his hands from his coat and pushed the Marshal with a quick movement from himself, and partially from Mrs. Terry, and immediately thereafter struck two or three very heavy blows with his clenched fist in the direction of the Marshal's face, whose back was then toward me. During this time, certain parties behind Mr. Terry were striving to pull him down, in which they finally succeeded, and Mrs. Terry was carried from the courtroom by the Marshal and some other person unknown to deponent. After the removal of Mrs. Terry from the room, Mr. Terry was allowed to arise and was then escorted from the room. And further deponent saith not.

ALFRED BARSTOW.

Subscribed and sworn to before me, this 11th day of September, 1888.

L. S. B. SAWYER,

Comr. U. S. Circuit Court, Northern Dist. Cal.

Endorsed: Filed Sept. 17, 1888.

L. S. B. SAWYER, Clerk.





fumble in her lap with the reticule, and finally with great nervousness and agitation she arose to her feet, and said, "Judge Field!" Mr. Justice Field at once replied, "Sit down, Madam." Mrs. Terry then said something, the entirety of which I did not hear, but I heard the following words: "How much have you been paid? Every one of you there have been paid for this decision." As soon as Mr. Justice Field heard these words, he turned to Marshal Franks, who was leaning against the end of the clerk's rail to the left of the bench, looking from the bench, and to the right of Terry and Mrs. Terry, looking from the position where I sat, and said, "Marshal, remove that lady from the court-room." At once noise and confusion arose on all sides. Mr. Franks sprang instantly towards Mrs. Terry, and as he did so Mr. David S. Terry arose, and said something to him, which I did not hear, and at the same time raised his fist, and struck Marshal Franks square in the face a very powerful blow. This did not stop Marshal Franks' progress towards Mrs. Terry but for a fraction of a second. He grabbed her by the arms, trying to bring her arm around under the small of her back; at the same time with the assistance of another person, whom I don't know, but apparently an officer endeavored to remove her from the court-room. Mr. Terry was rising to his feet at the time he struck Marshal Franks. Immediately after striking Marshal Franks, I saw Mr. Terry raise his right elbow and hand almost to the line of his shoulder, as if to place his hand in his inside coat pocket. I could not state whether he did place his hand in the inside of his coat or vest, because his back was partly turned to me at the time, but a moment afterwards, when he was turned around by the efforts of the Deputy Marshals, who surrounded him, I observed that his coat was unbuttoned, and the upper buttons of his vest;

his shirt around his neck was ruffled and pulled out of place.

Mrs. Terry resisted and kicked at the officers while they where removing her from the court-room. I saw Terry struggling with three officers who, immediately after Franks had pinioned Mrs. Terry, was thrown over backwards and partly on one knee and hip. His teeth were set and he was making every resistance possible. As soon as Mrs. Terry left the court-room he was assisted out after her. What than occurred I did not see.

JOSEPH D. REDDING.

Subscribed and sworn to, by the said Joseph D. Redding, before me this 14th day of September, 1888.

[SEAL.]

HENRI WIGGER,

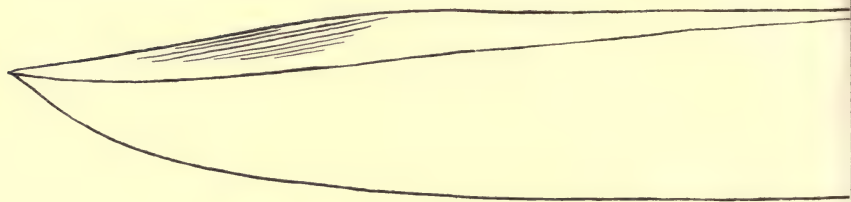
Notary Public in and for the City and County of San Francisco, State of California.

Endorsed: Filed Sept. 17, 1888.

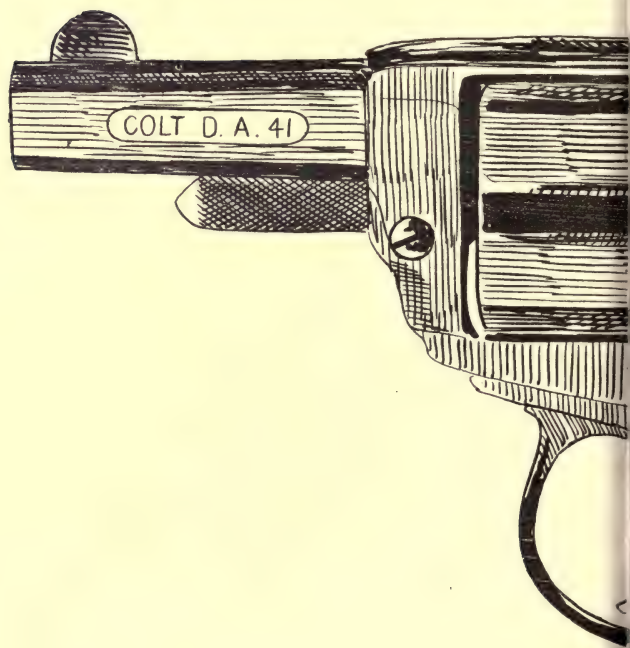
L. S. B. SAWYER, Clerk.



*Fac simile of D. S. Terry's knife, mentioned*

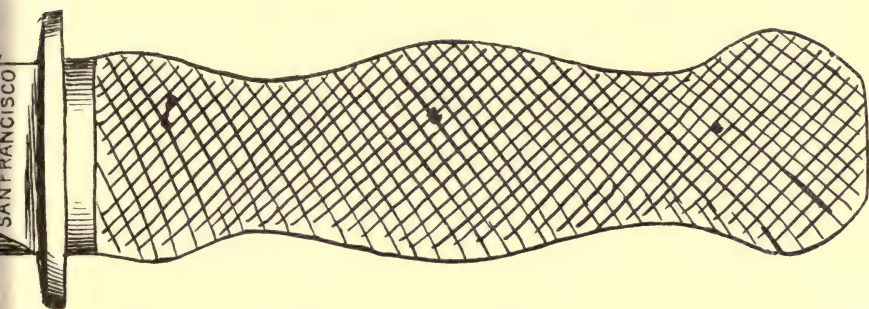


*Fac simile of Mrs. Terry's pistol*





*foregoing petition, opinion and affidavits.*



*mentioned in foregoing affidavits.*





Upon September 17, 1888, after the announcement of the opinion of the Court by Mr. Justice Field denying the petition of D. S. Terry for a revocation of the order committing him for contempt, Mr. Terry made public a correspondence between himself and Judge Solomon Heydenfeldt, which explains itself and is as follows:

*My Dear Terry*—The papers which our friend Stanley sends you will explain what we are trying to do. I wish to see Field to-morrow and sound his disposition, and if it seems advisable I will present our petition. But in order to be effective, and perhaps successful, I wish to feel assured and be able to give the assurance that failure to agree will not be followed by any attempt on your part to break the peace either by action or by demonstration. I know that you would never compromise one in any such manner, but it will give me the power to make an emphatic assertion to that effect, and that ought to help. Please answer promptly.

S. HEYDENFELDT.

The reply of Judge Terry is as follows:

OAKLAND, September 12, 1888.

*Dear Heydenfeldt*—Your letter was handed me last evening. I do not expect a favorable result from any application to the Circuit Court, and I have very reluctantly consented that an application be made to Judge Field, who will probably wish to pay me for my refusal to aid his Presidential aspirations four years ago. I had a conversation with Garber on Saturday last in which I told him if I was released I would seek no personal satisfaction for what had passed. You may say as emphatically as you wish that I do not contemplate breaking the peace, and that so far from seeking, I will avoid meeting any of the parties concerned. I will not promise that I will refrain from denouncing the decision or its authors. I believe that the decision was purchased and paid for with coin from the Sharon estate, and I would stay here ten years before I would say that I did not so believe. If the Judges of the Circuit Court would do what is right

they would revoke the order imprisoning my wife. She certainly was in contempt of Court, but that great provocation was given by going outside of the record to smirch her character ought to be taken into consideration in mitigation of the sentence. Field, when a legislator, thought that no Court should be allowed to punish for contempt by imprisonment for a longer period than five days. My wife has already been in prison double that time for words spoken under very great provocation. No matter what the result, I propose to stay here until my wife is dismissed.

Yours truly,

D. S. TERRY.

In the opinion of the Court of September 3, 1888, referred to in the foregoing letter as smirching the character of Mrs. Terry, there was nothing said reflecting upon Mrs. Terry, except what was contained in quotations from the opinion of Judge Sullivan of the State Court in deciding the divorce case of Sharon vs. Sharon. These quotations were near the end of the opinion of Mr. Justice Field. As the reading of this opinion occupied one and a half hours, and as Mrs. Terry's interruption occurred within the first half hour of the reading, these quotations were not read until about one hour after Mrs. Terry had been removed from the court-room, and for this reason they could not possibly have furnished Mrs. Terry any provocation or excuse for her conduct, as is stated in the letter of Mr. Terry.







The authority of the courts of the United States to punish for contempts committed in their presence.

---

IN THE MATTER OF DAVID S. TERRY,

ON PETITION FOR A WRIT OF HABEAS CORPUS.

---

## OPINION

OF THE

UNITED STATES SUPREME COURT

DELIVERED BY

MR. JUSTICE HARLAN,

*At October Term, 1888.\**

---

HARLAN, J. This is an original application to this court for a writ of *habeas corpus*. The petitioner, David S. Terry, alleges that he is unlawfully imprisoned, under an order of the Circuit Court of the United States for the Northern District of California, in the jail of Alameda County in that State.

That order is made a part of his application, and is as follows:

“In the Circuit Court of the United States of America for the Northern District of California.

“In the Matter of Contempt of David S. Terry.

“In open court.

“Whereas, on this 3d day of September, 1888, in open court, and in the presence of the judges thereof, to wit, Hon. Stephen J. Field, Circuit Justice, presiding; Hon. Lorenzo Sawyer, Circuit Judge, and Hon. George M. Sabin, District Judge, during the session of said court, and while said court was engaged in its regular business,

---

\* Reported in 128 U. S. Reports, 289.

hearing and determining causes pending before it, one Sarah Althea Terry was guilty of misbehavior in the presence and hearing of said court;

"And whereas said court thereupon duly and lawfully ordered the United States marshal, J. C. Franks, who was then present, to remove the said Sarah Althea Terry from the court-room;

"And whereas the said United States marshal then and there attempted to enforce said order, and then and there was resisted by one David S. Terry, an attorney of this court, who, while the said marshal was attempting to execute said order in the presence of the court, assaulted the said United States marshal, and then and there beat him, the said marshal, and then and there wrongfully and unlawfully assaulted said marshal with a deadly weapon, with intent to obstruct the administration of justice, and to resist such United States marshal and the execution of the said order;

"And whereas the said David S. Terry was guilty of a contempt of this court, by misbehavior in its presence, and by a forcible resistance in the presence of the court to a lawful order thereof, in the manner aforesaid:

"Now, therefore, be it ordered and adjudged by this court, That the said David S. Terry, by reason of said acts, was, and is, guilty of contempt of the authority of this court, committed in its presence on this 3d day of September, 1888;

"And it is further ordered, That the said David S. Terry be punished for said contempt by imprisonment for the term of six months;

"And it is further ordered, That this judgment be executed by imprisonment of the said David S. Terry in the county jail of the county of Alameda, in the State of California, until the further order of this court, but not to exceed said term of six months;

"And it is further ordered, That a certified copy of this order, under the seal of the court, be process and warrant for executing this order."

The petition alleges that "said order was made by said court in the absence of your petitioner, and without his having any notice of the intention of said court to take any proceeding whatever in relation to the matters re-



ferred to in said order, and without giving your petitioner any opportunity whatever of being heard in defence of the charges therein made against him."

The petition proceeds:

"And your petitioner further showeth that, on the 12th day of September, 1888, he addressed to the said Circuit Court a petition, duly verified by his oath, in the words and figures following, to wit:

'In the Circuit Court of the United States, Ninth Circuit,  
Northern District of California.

'In the Matter of Contempt of David S. Terry.

'To the Honorable Circuit Court aforesaid:

'The petition of David S. Terry respectfully represents:

'That in all the matters and transactions occurring in the said court on the 3d day of September, inst., upon which the order in this matter was based, your petitioner did not intend to say or do anything disrespectful to said court or the judges thereof, or to any one of them; that, when petitioner's wife, the said Sarah Althea Terry, first arose from her seat, and before she uttered a word, your petitioner used every effort in his power to cause her to resume her seat and remain quiet; and he did nothing to encourage her in her acts of indiscretion; when this court made the order that petitioner's wife be removed from the court-room, your petitioner arose from his seat with the purpose and intention of himself removing her from the court-room, quietly and peaceably, and had no intention or design of obstructing or preventing the execution of the said order of the court; that he never struck or offered to strike the United States marshal until the said marshal had assaulted himself, and had in his presence violently, and, as he believed, unnecessarily, assaulted petitioner's wife.

'Your petitioner most solemnly avers that he neither drew or attempted to draw any deadly weapon of any kind whatever in said court-room, and that he did not assault or attempt to assault the United States marshal with any deadly weapon in said court-room or elsewhere.

'And in this connection he respectfully represents that after he had left said court-room he heard loud talking in one of the rooms of the United States marshal, and

among the voices proceeding therefrom he recognized that of his wife, and he thereupon attempted to force his way into said room through the main office of the United States marshal; the door of this room was blocked with such a crowd of men that the door could not be closed; that your petitioner then for the first time drew from inside his vest a small sheath knife, at the same time saying to those standing in his way in said door, that he did not want to hurt any one; that all he wanted was to get in the room where his wife was; the crowd then parted, and your petitioner entered the doorway, and there saw an United States deputy marshal with a revolver in his hand pointed to the ceiling of the room; some one then said, 'Let him in, if he will give up his knife,' and your petitioner immediately released hold of the knife to some one standing by.

'In none of these transactions did your petitioner have the slightest idea of showing any disrespect to this honorable court or any of the judges thereof.

'That he lost his temper, he respectfully submits, was a natural consequence of himself being assaulted when he was making an honest effort to peacefully and quietly enforce the order of the court so as to avoid a scandalous scene, and of seeing his wife so unnecessarily assaulted in his presence.

'Wherefore your petitioner respectfully requests that this honorable court may, in the light of the facts herein stated, revoke the order made herein committing him to prison for six months.

'And your petitioner will ever pray, &c.

'Dated September 12th, 1888.'

The petitioner states that on the 17th of September, 1888, the Circuit Court "declined and refused to grant to your petitioner the relief prayed for or any other relief."

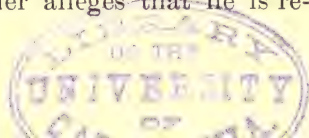
He also insists, in his petition, that the "Circuit Court had no jurisdiction of his person at the time it made the order hereinbefore set forth, and possessed no lawful power to make said order, and that he was entitled to be relieved from his said imprisonment upon the filing of the petition aforesaid, and that said order of said court is otherwise illegal and unwarranted by the law of the land."

That he may be relieved of said detention and imprisonment, he prays that he may be forthwith brought before this court, upon a writ of *habeas corpus*, to do, submit to, and receive what the law may require.

The above presents the entire case made by the application before us.

There can be no dispute either as to the power or duty of this court in cases of this character. Its power to issue a writ of *habeas corpus* for the purpose of inquiring into the cause of the restraint of the liberty of the person in whose behalf the writ is asked, is expressly conferred by statute, and extends to the cases, among others, of prisoners in jail under or by color of the authority of the United States, and of persons who are in custody in violation of the Constitution or laws of the United States. (R. S. §§ 751, 752, 753.) Its general duty in such cases is also prescribed by statute. Upon complaint in writing, signed by, and verified by the oath of the person for whose relief it is intended, setting forth the facts concerning the detention of the party restrained, in whose custody he is detained, and by virtue of what claim or authority, if known, it is the duty of the court to "forthwith award a writ of *habeas corpus*, unless it appears from the petition itself that the party is not entitled thereto." (R. S. §§ 754-5.) The writ need not, therefore, be awarded if it appear upon the showing made by the petitioner, that if brought into court, and the cause of his commitment inquired into, he would be remanded to prison. (*Ex parte Kearney*, 7 Wheat. 38, 45; *Ex parte Watkins*, 3 Pet. 193, 201; *Ex parte Milligan*, 4 Wall. 1, 11.)

It is proper in this connection to say that since the passage of the act of March 3, 1885, ch. 353, 23 Stat. 437, amending § 764 of the Revised Statutes so as to give this court jurisdiction, upon appeal, to review the final decisions of the Circuit Courts of the United States in cases of *habeas corpus*, when the petitioner alleges that he is re-



strained of his liberty in violation of the Constitution or laws of the United States, the right to the writ, upon original application to this court, is not, in every case, an absolute one. In *Wales v. Whitney*, (114 U. S. 564,) it appears that a direct application to this court for the writ, after a decision adverse to the petitioner in the Supreme Court of the District of Columbia, was abandoned on the suggestion that he could bring that decision to this court for review under the act of 1885; and it was brought here under that statute. In *Ex parte Royall*, (117 U. S. 241, 250,) upon appeal from a decision of a Circuit Court of the United States, refusing to award the writ to one alleging that he was restrained of his liberty in violation of the Constitution of the United States by an order of a State court, in which he stood indicted for an alleged offence against the laws of such State, it was held that while the Circuit Court had power to grant the writ and discharge the accused in advance of his trial under the indictment, it was not bound to exercise that power immediately upon application being made for the writ, but could await the result of the trial, and, in its discretion, as the special circumstances of the case might require, put the petitioner to his writ of error from the highest court of the State. In *Sawyer's case*, (124 U. S. 200,) this court entertained an original application for a writ of *habeas corpus* without requiring the petitioner to apply, in the first instance, to the proper Circuit Court; but, in that case, as in this, the application proceeded upon the ground that the Circuit Court itself had made the order by which he was alleged to have been deprived of his liberty in violation of the Constitution of the United States.

Nor can there be any dispute as to the power of a Circuit Court of the United States to punish contempts of its authority. In *United States v. Hudson*, (7 Cranch, 34,) it was held that the courts of the United States, from the very nature of their institution, possess the power to fine



for contempt, imprison for contumacy, enforce the observance of order, &c. In *Anderson v. Dunn*, (6 Wheat. 204, 227,) it was said that "courts of justice are universally acknowledged to be vested, by their very creation, with power to impose silence, respect, and decorum in their presence, and submission to their lawful mandates." So, in *Ex parte Robinson*, (19 Wall. 505, 510:) "The power to punish for contempts is inherent in all courts; its existence is essential to the preservation of order in judicial proceedings, and to the enforcement of the judgments, orders, and writs of the courts, and consequently to the due administration of justice. The moment the courts of the United States were called into existence and invested with jurisdiction over any subject, they became possessed of this power." (*Ex parte Bollman*, 4 Cranch, 75, 94; Story, Const. § 1774; Bac. Ab. Courts, E.) And such is the recognized doctrine in reference to the powers of the courts of the several States. "The summary power to commit and punish for contempts tending to obstruct or degrade the administration of justice," the Supreme Judicial Court of Massachusetts well said, in *Cartwright's case*, (114 Mass. 230, 238,) "is inherent in courts of chancery and other superior courts, as essential to the execution of their powers and to the maintenance of their authority, and is part of the law of the land within the meaning of Magna Charta and of the twelfth article of our Declaration of Rights." The Declaration of Rights here referred to was that which formed part of the constitution of Massachusetts, and contained the prohibition, inserted in most of the American constitutions, against depriving any person of life, liberty, or estate except by the judgment of his peers, or the law of the land. So in *Cooper's case*, (32 Vt. 253, 257:) "The power to punish for contempt is inherent in the nature and constitution of a court. It is a power not derived from any statute, but arising from necessity; implied, because it is necessary to

the exercise of all other powers." Without such power, it was observed in *Easton v. State*, (39 Ala. 552,) the administration of the law would be in continual danger of being thwarted by the lawless. To the same effect are *Watson v. Williams*, (36 Miss. 344;) *Johnston v. Commonwealth*, (1 Bibb, 598;) *Clark v. People*, (Breese Rep. 266;) *Commonwealth v. Dandridge*, (2 Va. Cases, 408;) *Ex parte Hamilton & Smith*, (51 Ala. 68;) *Redman v. State*, (28 Ind. 212;) *People v. Turner*, (1 Cal. 153;) *State v. Morrill*, (16 Ark. 388,) and numerous cases cited in note to *Clark v. People*, (Breese Rep. 266 in 12 Amer. Dec. 178.) See also *Queen v. Lefroy*, (9 Q. B. 134.) But this power, so far as the Circuit Courts of the United States are concerned, is not simply incidental to their general power to exercise judicial functions; it is expressly recognized, and the cases in which it may be exercised are defined by acts of Congress. They have power, by statute, "to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." (R. S. § 725; 1 Stat. 83; 4 Id. 487.)

With these observations as to the power and duty of the courts of the United States, when applied to for writs of *habeas corpus*, we proceed to the consideration of the general question as to whether the petition in this case shows that the prisoner is or is not entitled to the writ. The contention of his counsel is, that the Circuit Court failed to take such steps as were necessary to give jurisdiction of the person of the prisoner at the time the order

was made committing him to jail for contempt; and, therefore, that the order was illegal, and the writ should be awarded. If this position is sound, the conclusion stated would necessarily follow; for, while the writ may not be used to correct mere errors or irregularities, however flagrant, committed within the sphere of the authority of the court, it is an appropriate writ to obtain the discharge of one imprisoned under the order of a court of the United States which does not possess jurisdiction of the person or of the subject-matter. (*Ex parte Lange*, 18 Wall. 163; *Ex parte Parks*, 93 U. S. 8; *Ex parte Siebold*, 100 U. S. 371; *Ex parte Rowland*, 104 U. S. 604; *Ex parte Curtis*, 106 U. S. 371; *In re Ayer*, 123 U. S. 443, 485; *In re Sawyer*, 124 U. S. 200, 221; *Harvey v. Tyler*, 2 Wall. 328, 345; *Ex parte Fisk*, 113 U. S. 713, 718.) In this last case it was said that when "a court of the United States undertakes, by its process of contempt, to punish a man for refusing to comply with an order which that court had no authority to make, the order itself, being without jurisdiction, is void, and the order punishing for the contempt is equally void. It is well settled now, in the jurisprudence of this court, that when the proceeding for contempt in such a case results in imprisonment, this court will, by its writ of *habeas corpus*, discharge the prisoner." A judgment which lies without the jurisdiction of a court, even one of superior jurisdiction and general authority, is, upon reason and authority, a nullity.

This question, it must be here observed, does not involve an inquiry into the truth of the specific facts recited in the order of commitment, as constituting the contempt. As the writ of *habeas corpus* does not perform the office of a writ of error or an appeal, these facts cannot be re-examined or reviewed in this collateral proceeding. They present a case which, so far as the subject-matter is concerned, was manifestly within the jurisdiction of the Circuit Court. Notwithstanding the statements made in the peti-

tion addressed to the Circuit Court on the 12th of September, as to what the petitioner did, and as to what he did not do, on the occasion referred to in the order of commitment, it must be taken as true, upon the present application, and would be taken as true, upon a return to the writ, if one were awarded, that, on the 3d of September, 1888, Mrs. Terry was guilty of misbehavior in the presence of the judges of the Circuit Court, while they were engaged in the hearing and determination of causes pending before it; that the court thereupon ordered the marshal to remove her from the court-room; that the petitioner, an attorney, and, therefore, an officer, of the court, resisted the enforcement of the order by beating the marshal, and by assaulting him with a deadly weapon, with intent to obstruct the administration of justice and the execution of said order. It must also be taken as true, upon the present application, that what the petitioner characterizes as self-defence against an assault of the marshal, but which the Circuit Court in its order of commitment expressly finds, upon its personal view of the facts, was violence and misconduct upon his part, occurred in its immediate presence; for, if it were competent in this proceeding for the petitioner to contradict that fact, this has not been done. While in his petition to this court he disputes the jurisdiction of the Circuit Court of his person at the time he was imprisoned, his petition addressed to that court on the 12th of September, and made part of the present application, makes no question as to the alleged contempt having been committed in the presence of the Circuit Court, and only puts in issue the principal facts recited in the order of commitment as constituting the contempt for which he was punished. Those facts necessarily entered into the inquiry by the Circuit Court as to whether the prisoner was or was not guilty of contempt, and this court cannot, in this proceeding, in virtue of any power conferred upon it by existing legislation, go behind the



determination of them by that court. It can deal only with such defects in the proceedings below as render them, not simply erroneous or irregular, but absolute void. (*Ex parte Robinson*, 19 Wall. 505, 511; *Ex parte Kearney*, 7 Wheat. 38, 43.)

What, then, are the grounds upon which the petitioner claims that the Circuit Court was without jurisdiction to make the order committing him to jail? They are: 1, that the order was made in his absence; 2, that it was made without his having had any previous notice of the intention of the court to take any steps whatever in relation to the matters referred to in the order; 3, that it was made without giving him any opportunity of being first heard in defence of the charges therein made against him.

The second and third of these grounds may be dismissed as immaterial in any inquiry this court is at liberty, upon this original application, to make. For, upon the facts recited in the order of September 3, showing a clear case of contempt committed in the face of the Circuit Court, which tended to destroy its authority, and, by violent methods, to embarrass and obstruct its business, the petitioner was not entitled, of absolute right, either to demand a regular trial of the question of contempt, or to have notice by rule of the court's intention to proceed against him, or to opportunity to make formal answer to the charges contained in the order of commitment. It is undoubtedly a general rule in all actions, whether prosecuted by private parties, or by the government, that is, in civil and criminal cases, that "a sentence of a court pronounced against a party without hearing him or giving him an opportunity to be heard, is not a judicial determination of his rights, and is not entitled to respect in any other tribunal." (*Windsor v. McVeigh*, 93 U. S. 274, 277.) But there is another rule, of almost immemorial antiquity, and universally acknowledged, which is

equally vital to personal liberty and to the preservation of organized society, because upon its recognition and enforcement depend the existence and authority of the tribunals established to protect the rights of the citizen, whether of life, liberty, or property, and whether assailed by the illegal acts of the government or by the lawlessness or violence of individuals. It has relation to the class of contempts which, being committed in the face of a court, imply a purpose to destroy or impair its authority, to obstruct the transaction of its business, or to insult or intimidate those charged with the duty of administering the law. Blackstone thus states the rule: "If the contempt be committed in the face of the court, the offender may be instantly apprehended and imprisoned, at the discretion of the judges, without any further proof or examination. But in matters that arise at a distance, and of which the court cannot have so perfect a knowledge, unless by the confession of the party or the testimony of others, if the judges upon affidavit see sufficient ground to suspect that a contempt has been committed, they either made a rule on the suspected party to show cause why an attachment should not issue against him; or, in very flagrant instances of contempt, the attachment issues in the first instance, as it also does if no sufficient cause be shown to discharge, and thereupon the court confirms and makes absolute the original rule." (4 Bl. Com. 286.) In Bacon's Abridgment, title Courts, E, it is laid down that "every court of record, as incident to it, may enjoin the people to keep silence, under a pain, and impose reasonable fines, not only on such as shall be convicted before them of any crime on a formal prosecution, but also on all such as shall be guilty of any contempt in the face of the court, as by giving opprobrious language to the judge, or obstinately refusing to do their duty as officers of the court, and immediately order them into custody." It is utterly

impossible, said Abbott, C. J., in *Rex v. Davidson*, (4 B. & A. 329, 333,) "that the law of the land can be properly administered if those who are charged with the duty of administering it have not power to prevent instances of indecorum from occurring in their own presence. That power has been vested in the judges, not for their personal protection, but for that of the public. And a judge will depart from his bounden duty if he forbears to use it when occasions arise which call for its exercise."

To the same effect are the adjudications by the courts of this country. In *State v. Woodfin*, (5 Iredell's Law, 199,) where a person was fined for a contempt committed in the presence of the court, Chief Justice Ruffin said: "The power to commit or fine for contempt is essential to the existence of every court. Business cannot be conducted unless the court can suppress disturbances, and the only means of doing that is by immediate punishment. A breach of the peace *in facie curiæ* is a direct disturbance and a palpable contempt of the authority of the court. It is a case that does not admit of delay, and the court would be without dignity that did not punish it promptly and without trial. Necessarily there can be no inquiry *de novo* in another court, as to the truth of the fact. There is no mode provided for conducting such an inquiry. There is no prosecution, no plea, nor issue upon which there can be a trial." So in *Whitten v. State*, (36 Ind. 311:) "When the contempt is committed in the presence of the court, and the court acts upon view and without trial and inflicts the punishment, there will be no charge, no plea, no issue, and no trial; and the record that shows the punishment will also show the offence, and the fact that the court had found the party guilty of the contempt; on appeal to this court any fact found by the court below would be taken as true, and every intendment would be made in favor of the action of the court." Again, in *Ex parte Wright*, (65 Ind. 508,) the court, after



observing that a direct contempt is an open insult in the face of the court to the persons of the judges while presiding, or a resistance to its powers in their presence, said: "For a direct contempt the offender may be punished instantly by arrest and fine or imprisonment, upon no further proof or examination than what is known to the judges by their senses of seeing, hearing, &c." (4 Steph. Com. Bk. 6, c. 15; Tidd's Prac. 479-80; *Ex parte Hamilton & Smith*, 51 Ala. 68; *People v. Turner*, 1 Cal. 155.)

It is true, as counsel suggest, that the power which the court has of instantly punishing, without further proof or examination, contempts committed in its presence, is one that may be abused and may sometimes be exercised hastily or arbitrarily. But that is not an argument to disprove either its existence, or the necessity of its being lodged in the courts. That power cannot be denied them without inviting or causing such obstruction to the orderly and impartial administration of justice as would endanger the rights and safety of the entire community. What was said in *Ex parte Kearney*, (7 Wheat. 39, 45,) may be here repeated: "Wherever power is lodged it may be abused. But this forms no solid objection against its exercise. Confidence must be reposed somewhere; and if there should be an abuse, it will be a public grievance, for which a remedy may be applied by the legislature, and is not to be devised by courts of justice."

It results from what has been said that it was competent for the Circuit Court, immediately upon the commission, in its presence, of the contempt recited in the order of September 3, to proceed upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form. It was not bound to hear any explanation of his motives, if it was satisfied, and we must conclusively presume, from the record before us, that it was satisfied, from what occurred under its own eye and within its hearing, that the ends



of justice demanded immediate action, and that no explanation could mitigate his offence or disprove the fact that he had committed such contempt of its authority and dignity as deserved instant punishment. Whether the facts justified such punishment was for that court to determine under its solemn responsibility to do justice, and to maintain its own dignity and authority. (*In re Chiles*, 22 Wall. 157, 168.) Its conclusion upon such facts, we repeat, is not, under the statutes regulating the jurisdiction of this court, open to inquiry or review in this collateral proceeding. If we were to indulge in any presumption as to what actually occurred when the marshal proceeded in the execution of the order to remove Mrs. Terry from the court-room, we must presume that the Circuit Court fully considered the statements contained in the petition of September 12, and knowing them to be inaccurate or untrue, refused to set aside or modify its previous order of commitment. Its action in that regard cannot be revised or annulled by this court upon an original application for *habeas corpus*.

But it is contended that the order of September 3 was void, because, as alleged in the present application for the writ of *habeas corpus*, it was made in the "absence" of the petitioner. In considering this suggestion, it must not be forgotten that the order of imprisonment shows, and the fact is not asserted to be otherwise, that it was made and entered on the same day on which, and, presumably, at the same session of the court at which the contempt was committed; and there is no claim that any more time intervened between the commission of the contempt and the making of the order than was reasonably required to prepare and enter in due form such an order as the court, upon consideration, deemed proper or necessary. Indeed, the petition of September 12, made part of the present application, shows that the petitioner, after his personal conflict with the marshal in the presence of the judges,

voluntarily left the court-room, and with drawn knife forced his way into another room in the same building, occupied by the marshal, and to which, we presume, the latter, in executing the order above referred to, had removed Mrs. Terry. There is no pretence that the petitioner left the building in which the court was held before the order of commitment was passed.

The precise question, therefore, to be now determined, is, whether the retirement of the petitioner from the court-room into another room of the same building, after he had been guilty of misbehavior in the presence of the court, and had violently obstructed the execution of its lawful order, defeated the jurisdiction which it possessed. at the moment the contempt was committed, to order his immediate imprisonment, without other proof than that supplied by its actual knowledge and view of the facts, and without examination or trial in any form? In our judgment this question must be answered in the negative. Jurisdiction of the person of the petitioner attached instantly upon the contempt being committed in the presence of the court. That jurisdiction was neither surrendered nor lost by delay on the part of the Circuit Court in exercising its power to proceed, without notice and proof, and upon its own view of what occurred to immediate punishment. The departure of the petitioner from the court-room to another room, near by in the same building, was his voluntary act. And his departure, without making some apology for or explanation of his conduct, might justly be held to aggravate his offence, and to make it plain that, consistently with the public interests, there should be no delay upon the part of the court in exerting its power to punish.

If, in order to avoid punishment, he had absconded or fled from the building, immediately after his conflict with the marshal, the court, in its discretion, and as the circumstances rendered proper, could have ordered process

for his arrest and given him an opportunity, before sending him to jail, to answer the charge of having committed a contempt. But in such a case the failure to order his arrest, and to give him such opportunity of defence, would not affect its power to inflict instant punishment. Jurisdiction to inflict such punishment having attached while he was in the presence of the court, it would not have been defeated or lost by his flight and voluntary absence. Upon this point the decision in *Middlebrook v. State*, (43 Conn. 268,) is instructive. That was a case of contempt committed by a gross assault upon another in open court. The offender immediately left the court-house and the State. The court made reasonable efforts to secure his personal attendance, and, those failing, a judgment was entered in his absence, sentencing him to pay a fine and to be imprisoned for contempt of court. One of the questions presented for determination was whether there was jurisdiction of the person of the absent offender. The court said: "The offence was intentionally committed in the presence of the court. When the first blow was struck, that instant the contempt was complete, and jurisdiction attached. It did not depend upon the arrest of the offender, nor upon his being in actual custody, nor even upon his remaining in the presence of the court. When the offence was committed, he was in the presence and, constructively at least, in the power of the court. He may, by flight, escape merited punishment; but that cannot otherwise affect the right or the power of the court. Before the court could exert its power, the offender, taking advantage of the confusion, absented himself and went beyond the reach of the court; but, nevertheless, the jurisdiction remained, and it was competent for the court to take such action as might be deemed advisable, leaving the action to be enforced and the sentence carried into execution whenever there might be an opportunity to do so. If it was necessary that the judgment should be pre-

ceded by a trial, and the facts found upon a judicial hearing, as with ordinary criminal cases, it would be otherwise. But in this proceeding nothing of the kind was required. The judicial eye witnessed the act and the judicial mind comprehended all the circumstances of aggravation, provocation, or mitigation; and the fact being thus judicially established, it only remained for the judicial arm to inflict proper punishment." It is true that the present case differs from the one just cited in that the offender did not attempt by flight to escape punishment for his offence. But that circumstance could not affect the power of the Circuit Court, without trial or further proof, to inflict instant punishment upon the petitioner for the contempt committed in its presence. It was within the discretion of that court, whose dignity he had insulted, and whose authority he had openly defied, to determine whether it should, upon its own view of what occurred, proceed at once to punish him, or postpone action until he was arrested upon process, brought back into its presence, and permitted to make defence. Any abuse of that discretion would be at most an irregularity or error, not affecting the jurisdiction of the Circuit Court.

We have not overlooked the earnest contention of petitioner's counsel that the Circuit Court, in disregard of the fundamental principles of Magna Charta, in the absence of the accused, and without giving him any notice of the accusation against him, or any opportunity to be heard, proceeded "to accuse, to try, and to pronounce judgment, and to order him to be imprisoned; this for an alleged offence committed at a time preceding, and separated from, the commencement of his prosecution." We have seen that it is a settled doctrine in the jurisprudence both of England and of this country, never supposed to be in conflict with the liberty of the citizen, that for direct contempts committed in the face of the court, at least one of superior jurisdiction, the offender may, in its discretion,



be instantly apprehended and immediately imprisoned, without trial or issue, and without other proof than its actual knowledge of what occurred; and that, according to an unbroken chain of authorities, reaching back to the earliest times, such power, although arbitrary in its nature and liable to abuse, is absolutely essential to the protection of the courts in the discharge of their functions. Without it, judicial tribunals would be at the mercy of the disorderly and violent, who respect neither the laws enacted for the vindication of public and private rights, nor the officers charged with the duty of administering them. To say, in case of a contempt such as is recited in the order below, that the offender was accused, tried, adjudged to be guilty, and imprisoned, without previous notice of the accusation against him and without an opportunity to be heard, is nothing more than an argument or protest against investing any court, however exalted, or however extensive its general jurisdiction, with the power of proceeding summarily, without further proof or trial, for direct contempts committed in its presence.

Nor, in our judgment, is it an accurate characterization of the present case to say that the petitioner's offence was committed "at a time preceding, and separated from, the commencement of his prosecution." His misbehavior in the presence of the court, his voluntary departure from the court-room without apology for the indignity he put upon the court, his going a few steps, and under the circumstances detailed by him, into the marshal's room in the same building where the court was held, and the making of the order of the commitment, took place, substantially, on the same occasion, and constituted, in legal effect, one continuous complete transaction, occurring on the same day, and at the same session of the court. The jurisdiction, therefore, of the Circuit Court to enter an order for the offender's arrest and imprisonment was as

full and complete as when he was in the court-room in the immediate presence of the judges.\*

Whether the Circuit Court would have had the power at a subsequent term, or at a subsequent day of the same term, to order his arrest and imprisonment for the contempt, without first causing him to be brought into its presence, or without making reasonable efforts by rule or attachment to bring him into court, and giving him an opportunity to be heard before being fined and imprisoned,

---

\* Section 725 of the Revised Statutes provides that the courts of the United States "shall have power . . . to punish, by fine or imprisonment, at the discretion of the court, contempts of their authority: *Provided*, That such power to punish contempts shall not be construed to extend to any cases except the misbehavior of any person in their presence, or so near thereto as to obstruct the administration of justice, the misbehavior of any of the officers of said courts in their official transactions, and the disobedience or resistance by any such officer, or by any party, juror, witness, or other person, to any lawful writ, process, order, rule, decree, or command of the said courts." And the Supreme Court of the United States in the case of *Savin, Petitioner*, (131 U. S. 267, 277,) after quoting from Bacon, in his essay on Judicature, that "the place of justice is an hallowed place; and therefore not only the bench, but the footpace and precincts and purprise thereof ought to be preserved against scandal and corruption," held that, within the meaning of the statute, the court, at least when in session, is present in every part of the place set apart for its own use, and for the use of its officers, jurors, and witnesses, and misbehavior anywhere in such place is misbehavior in the presence of the court. "It is true," added the court, "that the mode of proceeding for contempt is not the same in every case of such misbehavior. Where the contempt is committed directly under the eye or within the view of the court, it may proceed 'upon its own knowledge of the facts, and punish the offender, without further proof, and without issue or trial in any form,' (*Ex parte Terry*, 128 U. S. 289, 309;) whereas, in case of misbehavior of which the judge cannot have such personal knowledge, and is informed thereof only by the confession of the party, or by the testimony under oath of others, the proper practice is, by rule or other process, to require the offender to appear and show cause why he should not be punished. (4 Bl. Com. 286.) But the difference in procedure does not affect the question as to whether particular acts do not, within the meaning of the statute, constitute misbehavior in the presence of the court."

is a question not necessary to be considered on the present hearing.

*The application for the writ of habeas corpus is denied.*

Mr. Justice FIELD took no part in the decision of this case.









---

OPINION

OF

The Circuit Court of the United States

FOR THE

NORTHERN DISTRICT OF CALIFORNIA,

IN THE

Matter of DAVID NEAGLE

UPON HABEAS CORPUS.

---

DELIVERED AT SAN FRANCISCO, SEPTEMBER 16, 1889,

BY

HON. LORENZO SAWYER,

*U. S. Circuit Judge.*

---







# In the Circuit Court

OF THE

UNITED STATES.

NINTH JUDICIAL CIRCUIT,

NORTHERN DISTRICT OF CALIFORNIA.

---

IN THE MATTER OF

DAVID NEAGLE

ON HABEAS CORPUS.

No. 10,469.

---

1. Under the provisions of Sections 751, 752 and 753 of the Revised Statutes, the Courts of the United States and their Judges have jurisdiction upon a writ of *habeas corpus*, to inquire into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or omitted in pursuance of a law of the United States," he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued—the Constitution and laws of the United States made in pursuance thereof being the supreme law of the land.

2. In the exercise of this jurisdiction, there is no conflict of authority between the State and the United States, the laws of the United States being the "Supreme law of the land," the authority of the State, in such cases, is subordinate, and that of the United States, paramount.

3. A State law which contravenes a valid law of the United States is void. In legal contemplation, there can no more be two valid conflicting laws, operating upon the same subject-matter, at the same

time, than in physics, two bodies can occupy the same space at the same time.

4. The United States is a government, with authority extending over the whole territory of the Union, acting upon the States, and the people of the States. While limited in the number of its powers, it is, so far as its sovereignty extends, supreme. No State can exclude it from exercising those powers, obstruct its authorized officers, against its will, or withhold from it the cognizance of any subject which the constitution has committed to it.

5. The Constitution and laws of the United States as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its Courts to enforce rights derived thereunder, is as extensive as the territory to which they are applicable.

6. The National Government has power to command obedience to its laws, to preserve order, and to keep the peace, in matters affecting National interests, and no person or power in the land has a right to resist, or question its authority, so long as it keeps within the bounds of its jurisdiction.

7. It is within the power of the Government of the United States to protect all the agencies and instrumentalities necessary to accomplish the objects and purpose of that Government. It is therefore empowered to protect the lives of the Judges of its Courts from assault and assassination on account of their judicial decisions by desperate, dissapointed litigants, not only while actually holding Court, but while such Judges are travelling through their Circuits for the purpose of holding Courts at the different places therein appointed by law for that purpose.

8. An assault upon or an assassination of a Judge of the United States Court while engaged in any matter pertaining to his official duties on account or by reason of his judicial decisions or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the United States Marshal or his deputies to prevent, as a peace officer of the national government.

9. By Section 788 R. S., and the several provisions of the Statutes of California prescribing the duties of Sheriffs by that section made applicable to Marshals, the United States Marshal is made a peace officer, and as such he is authorized to preserve the peace so far as a breach of the peace affects the authority of the United States and obstructs the operations of the government and its various departments. The Courts of the United States must be enabled fully to

perform all the functions imposed upon them by the Constitution and laws without hindrance or obstruction, and they have the inherent power to protect themselves by and through their executive officers under the direction and supervision of the Attorney-General and the President against obstruction and hindrance in the performance of their judicial duties.

10. Where a Deputy United States Marshal, acting under instructions from his superior officers—the United States Marshal and the Attorney-General—in protecting the life and person of a Justice of the Supreme Court of the United States from a murderous assault made on account of his judicial decisions, at the hands of a dissatisfied litigant, finds it necessary to take the life of the assailant and is arrested by the State authorities and held upon a charge of murder for such act, the United States Circuit Court may upon *habeas corpus* discharge such United States officer from the custody of the State authorities, upon it being shown that the homicide was necessary, or that it was reasonably apparent to the mind of the Deputy Marshal, at the time and under the circumstances surrounding him, that the killing was necessary in order to protect and defend the Justice from great bodily injury, or to save his life.

11. The homicide in such case, if an offense at all, is an offense under the laws of the State, and only the State can deal with it *in that aspect*. It is not claimed to be a crime punishable under the laws of the United States. But the homicide, when necessarily done by a Deputy Marshal in the performance of his duty in protecting the life and person of a Justice of the United States Supreme Court from assault and violence because of his judicial decisions, is an “act done in pursuance of a law of the United States,” and is not and cannot, therefore, be an offense against the laws of the State, no matter what the statute of the State may be—the laws of the United States being the supreme law of the land.

12. It is the exclusive province of the United States Courts to ultimately, and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is therefore, the prerogative of the National Courts to construe the National Statutes and determine upon *habeas corpus* whether a homicide for which the petitioner is charged with murder by the State authorities was the result of an “act done in pursuance of a law of the United States,” and when that question has been determined in the affirmative, the prisoner will be discharged, and the State has nothing more to do with the matter.

13. All the law of the United States is not specifically expressed in statutory enactments. Many powers are necessarily inherent in the

various departments of the Government, without which the Government could not perform functions necessary to its existence. The exercise of such powers, is, nevertheless, in pursuance of the laws of the United States.

14. When statutes confer powers, impose duties, and provide for the accomplishment of various objects they are, necessarily, couched in general terms, but they carry with them by implication, all the powers, duties and exemptions, necessary to accomplish the objects thereby sought to be attained.

15. The acts of the heads of departments of the United States Government in the line of their duties, are in contemplation of law, the acts of the President himself.

16. A party resisting a murderous assault, where several lives are in danger, being in the best position to judge as to the dangers and requirements of the occasion, is the one to determine when the proper moment has arrived, in self-defense, to slay his assailant, in order to be justified by the law; and if he acts in good faith, with reasonable judgment and discretion, the law will justify him, even though he errs. Where several lives are in danger from the assault of a powerful, infuriated, desperate man, common prudence would dictate that the party assailed should fire a second or two, too soon, rather than the fraction of a second too late.

Before SAWYER, Circuit Judge, and SABIN, Dist. Judge.

### STATEMENT OF FACTS.

This is an application for the discharge of David Neagle upon a writ of habeas corpus. It arises out of the following facts:

On the 3d of September, 1888, certain cases were pending in the Circuit Court of the United States for the Northern District of California, between Frederick W. Sharon, as executor, *vs.* David S. Terry and Sarah Althea Terry, his wife, and between Francis G. Newlands, as trustee, and others against the same parties, on demurrers to bills to revive and carry into execution the final decree of the court in the suit of *William Sharon vs. Sarah Althea Hill*, and were decided on that day. That suit was brought to have an alleged



marriage contract between the parties adjudged to be a forgery, and obtain its surrender and cancellation. The decree rendered adjudged the alleged marriage contract to be a forgery, and ordered it to be surrendered and canceled. The decree was rendered after the death of William Sharon, and was therefore entered as of the day when the case was submitted to the court. By reason of the death of Sharon it was necessary, in order to execute the decree, that the suit should be revived. Two bills were filed, one by the executor of the estate of Sharon, and the other a bill of revivor and supplemental by Newlands as trustee for that purpose.

In deciding the cases, the Court gave an elaborate opinion upon the questions involved, and whilst it was being read, certain disorderly proceedings took place for which the defendants, David S. Terry and his wife, were adjudged guilty of contempt and ordered to be imprisoned. The following is an accurate statement of those proceedings, slightly condensed from the opinion of the Court delivered on the subsequent application of David S. Terry to have the order of commitment revoked. For the whole proceeding, see *In re Terry*, 36 Fed. Rep., 419.

Shortly before the court opened, the defendants came into the courtroom, and took their seats within the bar at the table next to the clerk's desk, and almost immediately in front of the Judges, the defendant, David S. Terry, being at the time armed with a bowie-knife concealed on his person, and the defendant, Sarah Althea, his wife, carrying in her hand a small satchel which contained a revolver of six chambers, five of which were loaded. The court at the time was held by the Justice of the Supreme Court of the United States allotted to this circuit, who was presiding, the United States Circuit Judge of this circuit, and the United

States District Judge of the District of Nevada, called to this district to assist in holding the Circuit Court. Almost immediately after the opening of the court, the Presiding Justice commenced reading its opinion in the cases mentioned, but had not read more than one-fourth of it when the defendant, Sarah Althea Terry, arose from her seat and asked him, in an excited manner, whether he was going to order her to give up the marriage contract to be canceled.

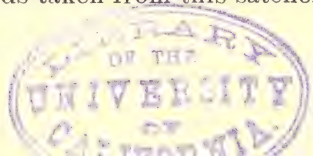
The Presiding Justice replied, "Be seated, madam." She repeated the question, and was again told to be seated. She then cried out, in a violent manner, that the Justice had been bought, and wanted to know the price he held himself at; that he had got Newland's money for his decision, and everybody knew it, or words to that effect. It is impossible to give her exact language. The Judges and parties present differed as to the precise words used, but all concurred as to their being of an exceedingly vituperative and insulting character.

The Presiding Justice then directed the Marshal to remove her from the court-room. She immediately exclaimed that she would not go from the room, and that no one could take her from it, or words to that effect. The Marshal thereupon proceeded towards her to carry out the order for her removal and compel her to leave, when the defendant David S. Terry rose from his seat, evidently under great excitement, exclaiming, among other things, that "No living man shall touch my wife," or words of that import, and dealt the Marshal a violent blow in his face. He then unbuttoned his coat and thrust his hand under his vest, where his bowie-knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he himself forced down on his back. The Marshal then removed

Mrs. Terry from the court-room. Soon afterward Mr. Terry was allowed to rise, and was accompanied by officers to the door leading to the corridor on which was the Marshal's office. As he was about leaving the room, or immediately after stepping out of it, he succeeded in drawing his knife, when his arms were seized by a Deputy Marshal and others present, to prevent him from using it, and they were able to take it from him only after a violent struggle.

The petitioner Neagle wrenched the knife from his hand, whilst four other persons held on to the arms and body of Terry, one of whom presented a pistol to his head, threatening at the same time to shoot him if he did not give up the knife. To these threats Terry paid no attention, but held on to the knife, actually passing it during the struggle from one hand to another.

Mr. Cross, a prominent attorney, who on that occasion sat next to Mrs. Terry, a little to her left and rear, testifies that just before she arose to interrupt Justice Field, she nervously worked at the clasp of a small satchel about nine inches long, and tried to open it; and not succeeding, in consequence of her excitement, she hastily sprang to her feet and interrupted the Justice as hereinbefore stated. Knowing that she had before drawn a pistol from a similar satchel in the Master's room, he concluded at this time that she was trying to get her pistol out, and he consequently held himself in readiness to seize her arm as soon as it should appear, and endeavor to prevent its use until he could get assistance, his right arm being partially disabled. For one occasion in the Master's office see (*Sharon vs. Hill*, 11 Sawyer, 123.) At this time Mrs. Terry sat directly in front of Justice Field and the Circuit Judge, less than four yards from either. A loaded revolver was afterwards taken from this satchel



by the Marshal. For their conduct and resistance to the execution of the order of the Court, the defendants, Sarah Althea Terry and David S. Terry, were adjudged guilty of contempt and ordered to be imprisoned, the former for thirty days and the latter for six months.

In consequence of the imprisonment which followed, various threats of personal violence to Justice Field and the Circuit Judge were made by Terry and his wife. Those threats were that they would take the lives of both of those Judges; those against Justice Field were sometimes that they would take his life directly, at other times that they would subject him to great personal indignities and humiliations, and if he resented it they would kill him.

These threats were not made in ambiguous terms, but openly and repeatedly, not to one person, but to many persons, until they became the subject of conversation throughout the State and of notice in the public journals. Reports of these threats through the press and through reports of the United States Marshal and United States Attorney reached Washington, and in consequence of them the Attorney-General thought proper to give instructions to the Marshal of the United States for the Northern District of California to take proper measures to protect the persons of those judges from violence at the hands of Terry and his wife. On the return of Justice Field from Washington to attend his circuit in June last, the probability of an attack by Judge Terry upon him was the subject of conversation throughout the State and of notices in some of the journals in the city of San Francisco. It was the general expectation that if Judge Terry met Justice Field violence would be attempted upon the latter.

In consequence of this general belief and expectation, and the fact that the Attorney-General of the



United States had given instructions to the Marshal to see that the persons of Justice Field and of the Circuit Judge should be protected from violence, the Marshal of the Northern district appointed the petitioner in this case, David Neagle, to accompany Mr. Justice Field whilst engaged in the performance of his duties and whilst passing from one district to another within his circuit, so as to guard him against the threatened attacks. He was specially commissioned as a deputy by Mr. Franks, whose instructions to him were that he should protect Justice Field at all hazards, and knowing the violent and desperate character of Terry, that he should be active and alert, and be fully prepared for any emergency, but not to be rash; and in case any violence was attempted from anyone, to call upon the assailant to stop, and to inform him that he was an officer of the United States.

Judge Terry was a man of great size and strength, who had the reputation of being always armed with a bowie-knife, in the use of which he was specially skilled, and of showing great readiness to draw and use it upon persons towards whom he entertained any enmity or had any grievance, real or fancied.

On the 8th of August, 1889, Justice Field left San Francisco for Los Angeles in order to hear a *habeas corpus* case which was returnable before him at that city on the 10th of August, and also to be present at the opening of the court on the 12th. He was accompanied by Deputy Marshal Neagle, the petitioner. Justice Field heard the *habeas corpus* case on the 10th of August. On the 12th of August he opened the Circuit Court, Judge Ross sitting with him, and he delivered on the latter day an opinion in an important land case, and also an opinion in the *habeas corpus* case. On the following day the Court heard an application for

an injunction in an important water case from San Diego County. No other cases being ready for hearing before the Circuit Court, he took the train on Tuesday, the 13th, at 1:30 o'clock in the afternoon, for San Francisco, where he was expected to hear a case then awaiting his arrival immediately upon his return, being accompanied on his return by Deputy Marshal Neagle. On the morning of the 14th, between the hours of seven and eight, the train arrived at Lathrop, in San Joaquin County, which is in the Northern District of California, a station at which the train stopped for breakfast. Justice Field and the Deputy Marshal at once entered the dining-room there to take their breakfast, and took their seats at the third table in the middle row of tables. Justice Field seated himself at the extreme end, on the side looking toward the door. The Deputy Marshal took the next seat on the left of the Justice. What subsequently occurred is thus stated in the testimony of Justice Field:

“A few minutes afterward Judge Terry and his wife came in. When Mrs. Terry saw me, which she did directly she got diagonally opposite me, she wheeled around suddenly and went out in great haste. I afterwards understood, as you heard here, that she went for her satchel. Judge Terry walked past, opposite to me, and took his seat at the second table below. The only remark I made to Mr. Neagle was, ‘There is Judge Terry and his wife.’ He remarked, ‘I see him.’ Not another word was said. I commenced eating my breakfast. I saw Judge Terry take his seat. In a moment or two afterwards I looked round and saw Judge Terry rise from his seat. I supposed at the time he was going out to meet his wife, as she had not returned, so I went on with my breakfast. It seems, however, that he came round back of me—I did not see him—and he

struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard 'Stop, stop,' cried by Neagle. Of course I was for a moment dazed by the blows. I turned my head round and I saw that great form of Terry's, with his arm raised and his fists clenched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way, as though to strike the side of my temple, when I heard Neagle cry out, "Stop, stop, I am an officer." Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks that I did; but I did not. I looked around and saw Terry on the floor. I looked at him and saw that peculiar movement of the eyes that indicates the presence of death. Of course it was a great shock to me. It is impossible for anyone to see a man in the full vigor of life, with all those faculties that constitute life, instantly extinguished, without being affected, and I was. I looked at him for a moment, then rose from my seat, went around and looked at him again, and passed on. Great excitement followed. A gentleman came to me whom I did not know, but I think it was Mr. Lidgerwood, who has been examined as a witness in this case, and said: 'What is this?' I said: 'I am a Justice of the Supreme Court of the United States. My name is Judge Field. Judge Terry threatened my life, and attacked me, and the Deputy Marshal has shot him.' The Deputy Marshal was perfectly cool and collected, and stated: "I am a Deputy Marshal and I have shot him to protect the life of Judge Field." I cannot give you the exact words, but I give them to you as near as I can remember them. A few moments afterwards the Deputy Marshal said to me: 'Judge, I

think you had better go to the car.' I said, 'Very well.' Then this gentleman, Mr. Lidgerwood, said: 'I think you had better.' And with the two I went to the car. I asked Mr. Lidgerwood to go back and get my hat and cane, which he did. The Marshal went with me, remained for some time and then left his seat in the car, and as I thought went back to the dining-room. (This is, however, I am told, a mistake, and that he only went to the end of the car). He returned, and either he or someone else stated that there was great excitement, that Mrs. Terry was calling for some violent proceedings. I must say here that, dreadful as it is to take life, it was only a question of seconds whether my life or Judge Terry's life should be taken. I am firmly convinced that had the Marshal delayed two seconds both he and myself would have been the victims of Terry."

In answer to a question whether he had a pistol or other weapon on the occasion of the homicide, Justice Field replied: "No, Sir. I have never had on my person, or used a weapon since I went on the bench of the Supreme Court of the State, on October 13, 1857, except once." That was on an occasion when he crossed the Sierra Nevada Mountains, in 1862. "With that exception, I have not had on my person, or used a pistol or other deadly weapon."

Mr. Neagle in his testimony stated that before the train arrived at Fresno, he got up and went out on the platform, leaving the train, and there saw Judge Terry and his wife get on the cars; that when the train arrived at Merced he spoke to the conductor, Woodward, and informed him that he was a Deputy United States Marshal; that Judge Field was on the train, and also Judge Terry and his wife, and that he was apprehensive that when the train arrived at Lathrop there would be trouble between those parties, and inquired whether there was any officer at that



station, and was informed in reply that there was a constable there; that he then requested the conductor to send word to the officer to be at Lathrop on the arrival of the train, and that he also applied to other parties to induce them to endeavor to secure assistance for him at that place in case it should be needed. The Deputy Marshal further stated that when the train arrived at Lathrop Justice Field went into the dining-room, he accompanying the Justice; that they took seats at a table, that shortly after they were seated, Judge Terry and his wife entered the dining-room, his wife following him several feet in the rear; that when the wife reached a point nearly opposite Justice Field, she turned around and went out rapidly from the room, and, as appeared from what afterward followed, she went to the car to get her satchel. When she returned from the car, the satchel was taken from her, and it was found to contain a pistol—revolver—containing six chambers, all of which were loaded with ball. This pistol lay on the top of the other articles in the satchel. The witness further stated that Judge Terry passed down opposite Justice Field, to a table below where they were sitting; that in a few minutes, whilst Justice Field was eating, Judge Terry rose from his seat, went around behind him—the Justice not seeing him at the time—and struck him two blows, one on the side and the other on the back of the head; that the second blow followed the other immediately; that one was given with the right hand and the other with the left; that Judge Terry then drew back his hand, with his fist clenched, apparently to give the Justice a violent blow on the side of his head, when he, Neagle, sprang to his feet, calling out to Terry, “Stop! Stop! I am an officer;” that Terry bore at the time on his face an expression of intense hate and passion, the most malignant the

witness had ever seen in his life, and that he had seen a great many men in his time in such situations, and that the expression meant life or death for one or the other; that as he cried out those words, "Stop! Stop! I am an officer," he jumped between Terry and Justice Field, and at that moment Judge Terry appeared to recognize him, and instantly, with a growl, moved his right hand to his left breast, to the position where he usually carried his bowie-knife; that, as his hand got there, the Deputy Marshal raised his pistol and shot twice in rapid succession, killing him almost instantly. He further stated that the position of Judge Field was such—his legs being at the time under the table, and he sitting—that it would have been impossible for him to have done anything even if he had been armed, and that Judge Terry had a very furious expression, which was characterized by the witness as that of an infuriated giant. He also added, that his cry to him to stop was so loud that it could be heard throughout the whole room, and that he believed that a delay in shooting of two seconds would have been fatal both to himself and Justice Field.

The facts thus stated in the testimony of Justice Field and the petitioner, were corroborated by the testimony of all the witnesses to the transaction. The petitioner soon afterwards accompanied Justice Field to the car, and whilst in the car he was arrested by a constable, and at the station below Lathrop was taken by that officer from the car to Stockton, the county seat of San Joaquin County, where he was lodged in the county jail. Mr. Justice Field was obliged to continue on to San Francisco without the protection of any officer. On the evening of that day Mrs. Terry, who did not see the transaction, but was at the time outside of the dining-room, made an affidavit that the killing of Judge Terry was murder, and charged Justice

Field and Deputy Marshal Neagle with the commission of the crime. Upon this affidavit, a warrant was issued by a Justice of the Peace at Stockton against Neagle and also against Justice Field. Subsequently, after the arrest of Justice Field, and after his being released by the United States Circuit Court on *habeas corpus* upon his own recognizance, the proceeding against him before the Justice of the Peace was dismissed, the Governor of the State having written a letter to the Attorney-General of the State, declaring that the proceeding, if persisted in, would be a burning disgrace to the State, and the Attorney-General having advised the District Attorney of San Joaquin County to dismiss it. There was no other testimony whatever before the Justice of the Peace except the affidavit of Sarah Althea Terry upon which the warrant was issued.

In the suit of William Sharon against Mrs. Terry in the Circuit Court of the United States, it was adjudged that the alleged marriage contract between her and Sharon, produced by her, was a forgery, and it was held that she had attempted to support it by perjury and subornation of perjury. She had also made threats during the past year, and up to the time of the shooting of Judge Terry, that she would kill the Circuit Judge and Justice Field, and she repeated that threat up to the time she made her affidavit for the arrest of Justice Field and Neagle; and that she had made such threats was a notorious fact in Stockton and throughout the State.

The petition was accordingly presented, on behalf of Neagle, to the Circuit Court of the United States for a writ of *habeas corpus* in this case, alleging, among other things, that he was arrested and confined in prison for an act done by him in the performance of his duty, namely, the protection of Mr. Justice Field, and taken

away from the further protection which he was ordered to give to him. The writ was issued, and upon its return, the Sheriff of San Joaquin County produced a copy of the warrant issued by the Justice of the Peace of that county, and of the affidavit of Sarah Althea Terry upon which it was issued. A traverse to that return was then filed in this case, presenting various grounds why the petitioner should not be held, the most important of which were, that an officer of the United States, specially charged with a particular duty, that of protecting one of the Justices of the Supreme Court of the United States whilst engaged in the performance of his duty, could not, for an act constituting the very performance of that duty, be taken from the further discharge of his duty and imprisoned by the State authorities, and that when an officer of the United States in the discharge of his duties is charged with an offense consisting in the performance of those duties, and is sought to be arrested, and taken from the further performance of them, he can be brought before the tribunals of the nation of which he is an officer, and the fact then inquired into. The Attorney-General of the State appeared with the District Attorney of San Joaquin County, and contended that the offense of which the petitioner is charged could only be inquired into before the tribunals of the State.

The question of the jurisdiction of the national tribunal to interfere in the matter was elaborately argued by counsel, the Attorney-General of the State and Mr. Langhorne appearing with the District Attorney of San Joaquin county on behalf of the State, and Mr. Carey, United States Attorney, and Messrs. Herrin, Mesick and Wilson appearing on behalf of the petitioner. The latter did not pretend that any person in this State, high or low, who committed a crime, might not be tried by the local authorities if it were a crime



against the State, but that when in the performance of his duties that alleged crime consisted in an act which is deemed a part of the performance of a duty devolved upon him by the laws of the United States, it was within the competency of the national tribunals to determine in the first instance whether that act was a duty devolving upon him, and if it was a duty devolving upon him the officer had committed no offense against the State and was entitled to be discharged.

JOHN T. CAREY, United States Attorney; RICHARD S. MESICK, SAMUEL M. WILSON, WM. F. HERRIN, W. L. DUDLEY, C. L. ACKERMAN, J. C. CAMPBELL, H. C. MCPIKE, for the Petitioner.

G. A. JOHNSON, Attorney-General, State of California; J. P. LANGHORNE; AVERY C. WHITE, District Attorney, San Joaquin County, Cal., for the Respondent.

### OPINION OF THE COURT.

By the Court, Sawyer, Circuit Judge: The petitioner has sued out a writ of habeas corpus, returnable before the Court, alleging that he is unlawfully deprived of his liberty and imprisoned by virtue of a warrant issued by a Justice of the Peace of San Joaquin county, in this State, charging him with a felonious homicide, whilst the act thus characterized was a lawful act performed in the discharge of his duties as an officer of the United States; and the first question presented is whether this Court has jurisdiction to inquire into the truth of that allegation.

Upon the question of jurisdiction, Section 751, R. S., provides that "the Supreme Court and the Circuit and District Courts shall have power to issue writs of habeas corpus;" and Section 752 further provides that

“the several justices and judges of the said courts, within their respective jurisdictions, shall have power to grant writs of habeas corpus for the purpose of an inquiry into the cause of restraint of liberty.” There is no limit in these provisions to the jurisdiction of these courts and judges to inquire into the restraint of liberty of any person. But Section 753 prescribes some limitations, among which is “that the writ shall not extend to a prisoner in jail, \* \* \* unless he is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a Court thereof, or in custody in violation of the Constitution, or of a law or treaty of the United States,” and this legislation, in the language of the Chief Justice, in *McCardle's case*, (6 Wall., 325-6), in commenting upon the same provision in a prior act, “is of the most comprehensive character. It brings within the habeas corpus jurisdiction of every Court, and of every Judge, every possible case of privation of liberty, contrary to the National Constitution, treaties or laws. It is impossible to widen this jurisdiction.” And again, in *Ex Parte Royall*, 117 U. S., 249, the Supreme Court says, “As the judicial power of the nation extends to all cases arising under the Constitution, the laws and treaties of the United States; as the privilege of the writ of habeas corpus cannot be suspended unless when in cases of rebellion or invasion, the public safety may require it; and as Congress has power to pass all laws necessary and proper to carry into execution the powers vested by the Constitution in the Government of the United States, or in any department or officer thereof; no doubt can exist as to the power of Congress thus to enlarge the jurisdiction of the courts of the Union, and of their justices and judges. That the petitioner is held under the authority of a State cannot effect the question of the power or jurisdiction

of the Circuit Court, to inquire into the cause of his commitment, and to discharge him if he be restrained of his liberty in violation of the Constitution. The Grand Jurors who found the indictment, the Court into which it was returned and by whose order he was arrested, and the officer who holds him in custody, are all equally with citizens, under a duty, from the discharge of which the State could not release them, to respect and obey the supreme law of the land, 'anything in the Constitution and laws of any State to the contrary notwithstanding, 'and that equal power does not belong to the courts and judges of the several States; that they cannot under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of commissioners of such courts, or by officers of the General Government acting under its laws, results from the supremacy of the Constitution and laws of the United States.'" *Ableman vs. Booth*, 21 How., 506; *Tarble's Case*, 13 Wall., 397; *Robb vs. Connolly*, 111 U. S., 624.

"We are, therefore, of opinion that the Circuit Court has jurisdiction upon writ of habeas corpus to inquire into the cause of appellant's commitment, and to discharge him, if he be held in custody in violation of the Constitution."

In the exercise of this jurisdiction there is no conflict between the authority of the State and of the United States. The State in such cases is subordinate, and the National Government paramount. "The Constitution and laws of the United States are the supreme law of the land, and to these every citizen of every State owes obedience, whether in his individual or official capacity." *Siebold's case*, (100 U. S., 392); see also *Tennessee vs. Davis*, (100 U. S., 257-8). The exclusive authority of the State to determine

whether an offense has been committed against the laws of the State is now earnestly pressed upon our attention. In Siebold's case the Court says: "It seems to be often overlooked that a national constitution has been adopted in this country, establishing a real government therein, operating upon persons and territory and things; and which, moreover, is, or should be, as dear to every American citizen as his State government is. Whenever the true conception of the nature of this government is once conceded, no real difficulty will arise in the just interpretation of its powers. But if we allow ourselves to regard it as a hostile organization, opposed to the proper sovereignty and dignity of the State governments, we shall continue to be vexed with difficulties as to its jurisdiction and authority. No greater jealousy is required to be exercised toward this government in reference to the preservation of our liberties than is proper to be exercised toward the State governments. Its powers are limited in number and clearly defined, and its action within the scope of those powers is restrained by a sufficiently rigid bill of rights for the protection of its citizens from oppression. The true interest of the people of this country requires that both the National and State Governments shall be allowed, without jealous interference on either side, to exercise all the powers which respectively belong to them according to a fair and practical construction of the Constitution. State rights and the rights of the United States should be equally respected. Both are essential to the preservation of our liberties and the perpetuity of our institutions. But, in endeavoring to vindicate the one, we should not allow our zeal to nullify or impair the other." 100 U. S., 394; see *Id.*, 266-7.



This Court, then, has jurisdiction to inquire upon this writ into the cause of the imprisonment of the petitioner, and if, upon such inquiry, he is found to be "in custody for an act done or committed in pursuance of a law of the United States," then he is in custody in violation of the Constitution and laws of the United States, and he is entitled to be discharged, no matter from whom or under what authority the process under which he is held may have issued—the Constitution and laws of the United States made in pursuance thereof being the supreme law of the land.

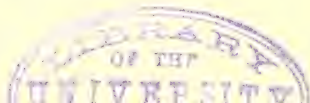
The homicide in question, if an offense at all, is, it must be conceded, an offense under the laws of the State of California, and only the State can deal with it as such or in that aspect. It is not claimed to be an offense under the laws of the United States. But if the killing of Terry by Neagle was an "act done \* \* \* in pursuance of a law of the United States," within the powers of the National Government, then it *is not*, and *it cannot* be, an offense against the laws of the State of California, no matter what the statute of the State may be, the laws of the United States being the supreme law of the land. A State law which contravenes a valid law of the United States, is in the nature of things, necessarily void—a nullity. It must give place to the "supreme law of the land." In legal contemplation there can no more be two valid laws which are in conflict, operating upon the same subject matter at the same time, than in physics two bodies can occupy the same space at the same time.

But, as we have seen by the authorities cited, it is the exclusive province of the Judiciary of the United States to ultimately and conclusively determine any question of right, civil or criminal, arising under the laws of the United States. It is, therefore, the prerogative of the National Courts to

conclusively construe the National Statutes and determine whether the homicide in question was the result of an "act done in pursuance of a law of the United States," and when that question has been determined in the affirmative, the petitioner must be discharged, and the State has nothing more to do with the matter. All we claim is the right to determine the question, was the homicide the result of "an act done in pursuance of a law of the United States?" and if so, discharge the petitioner.

As incidental to and involved in that question, it is necessary to inquire whether the act of the petitioner was performed under such circumstances as to justify it. If it was, then he was in the line of his duty. If not, then it was outside his duty. We do not make the inquiry at all for the purpose of determining whether the act was an offense, or justifiable under the Statutes of the State. We do not assume to consider the case in that aspect at all. We simply determine whether it was an act performed in pursuance of a law of the United States. Nor do we act in this matter because we have the slightest doubt as to the impartiality of the State courts, and their ability and disposition to, ultimately, do exact justice to the petitioner. We have not the slightest doubt or apprehension in that particular; but there is a principle involved. The question is, has the petitioner a *right* to have his acts adjudged, and, if found to have been performed in the strict line of his authority and duty, a further right to be protected by that sovereignty whose servant he is and whose laws he was executing? If he has that right, then there is no encroachment upon the State jurisdiction, and this Court must necessarily entertain his petition and determine his rights under it, and under the laws of the United States. It has no discretion. It cannot decline to hear him without

an utter disregard of one of the most important duties imposed upon it by the Constitution and laws of the United States. What the State tribunals might, or might not do, in this particular instance is not a matter for a moment's consideration. The question is, what are the rights of the petitioner as to having his case heard and disposed of in the courts of the sovereignty whose servant he is and whose laws he was employed in executing. If he has a right to be heard in this Court, then we must hear him, willing or unwilling. There is no alternative. Whether the writ should issue, in this case, was not a question of "expediency," and whether the petitioner shall be discharged or remanded is not a question of "policy" or "comity," as suggested in some quarters. It is a question of personal right and personal liberty arising under the constitution and laws of the United States, which the Court cannot ignore. There is a class of cases, of which *ex parte Royall* is an example, in which the Court may exercise a discretion as to the time of interference, but, in our opinion, this is not one of them. *Ex parte Royall*, 117 U. S., 251. But if it rests in our discretion to discharge or remand the petitioner to the State Courts, to be there first tried for an offense against the State, while we are satisfied that he is entitled to be discharged, to what useful end would he be sent back, since upon being tried and convicted he would still be discharged by the national courts on *habeas corpus*, if the act should appear to them to have been performed in pursuance of a law of the United States? This would be but to put the State to great useless expense, and subject the petitioner, if guilty of no offense, to unjust imprisonment in violation of his legal rights, until his trial could be had, and his writ of *habeas corpus* afterwards again sued out, heard and decided, when the result, in all probability, would



at last be the same. Evidently, public justice demands that the case should be "summarily" decided now, as required by Section 761, R. S. The Court has no right to trifle with the petitioner's constitutional rights by unnecessarily subjecting him to unjust imprisonment, great expense and vexatious delays. In case of a remand and conviction, the national courts must hear and decide the case at last. Far better for all concerned that they should decide it now, and forever end it. We have no desire to usurp a jurisdiction that does not belong to us. We have enough to do in exercising the admitted jurisdiction conferred upon us, without seeking to enlarge it in the smallest particular, but we must perform our duty as we understand it, be the consequences what they may.

The Statutes of the United States also make ample provision for giving full effect to the jurisdiction of this Court in cases where the petitioner alleges that he is restrained of his liberty in violation of the Constitution or of a law of the United States, in Section 766, which reads as follows, to wit:

"Pending the proceedings or appeal in the cases mentioned in the three preceding sections, and until final judgment therein, and after final judgment of discharge, any proceeding against the person so imprisoned or confined or restrained of his liberty, in any State court, or by or under the authority of any State, for any matter so heard and determined, or in process of being heard and determined, under such writ of habeas corpus, shall be deemed null and void."

It is, therefore, only necessary, in order to dispose of the case, to inquire and ascertain whether the petitioner is in custody for an act done in pursuance of a law of the United States.



As we have seen from the statement of facts, Mr. Justice Field, of the United States Supreme Court, allotted to the Ninth Circuit, was traveling, officially, from one part of his circuit to another, in pursuance of the requirements of the statutes of the United States, for the purpose of holding a Circuit Court. By reason of threats against his life made by dissatisfied litigants, generally known and published in the newspapers and brought to the knowledge of the United States Marshal for the Northern District of California, and by him called to the attention of the Attorney-General of the United States, that officer directed the Marshal to furnish the Justice with protection while thus engaged in the performance of his judicial duties on the circuit. The Marshal, deeming it proper, furnished the necessary protection by assigning that duty to the petitioner, who was a United States Deputy Marshal. The claim is that the petitioner, as such Deputy Marshal, was affording the only protection practicable to Justice Field, in the lawful discharge of his duty, when the homicide was committed, and that the killing was necessary for the preservation of the lives of both Justice Field and himself at the time the fatal shot was fired. The homicide was committed at Lathrop, and not upon land purchased by the United States with the consent of the State for the needful uses of the United States, in pursuance of Article 1, Section 8, of the Constitution.

Conceding the points to be as stated, do they present a case of an act performed in pursuance of a law of the United States, subject to their jurisdiction and to the jurisdiction of this Court, and is the petitioner held under an arrest on a charge of murder by the State, "in custody in violation of the Constitution or laws of the United States," within the meaning of the statute?

It is urged that since the homicide was committed in the State at large, and not in the Courthouse or upon land within the exclusive jurisdiction of the United States, the question as to whether the homicide is murder is a question arising exclusively under the laws of the State, and that it can be investigated and determined by the State courts alone. It is admitted on the part of the State that the United States has exclusive jurisdiction over the Custom House block and "over all places purchased by the consent of the Legislature of the State, in which the same shall be, for the erection of forts, magazines, arsenals, dock-yards, and other needful buildings," in pursuance of Section 8, Article I. of the National Constitution, and that the State has no jurisdiction whatever of any offense committed in such places. But it is contended that the United States has no jurisdiction of offenders outside the lands so purchased, in other portions of the State, but that in the State at large the jurisdiction of the State is exclusive. This proposition, like most others urged by those who insist on extreme State rights doctrines, wholly ignores the principle that there can be no legal conflict or inconsistency in matters wherein the State is subordinate, and the United States paramount—where the Constitution and laws of the United States are the supreme law of the land. We have already seen that although in certain cases the courts of the United States have jurisdiction to discharge on habeas corpus, prisoners held in custody by the State courts in violation of the Constitution and laws of the United States, yet that the State courts "cannot under any authority conferred by the State, discharge from custody persons held by authority of the courts of the United States, or of Commissioners of such courts, or by officers of the general government acting under

such laws," and that this "results from the supremacy of the Constitution and laws of the United States." This principle, established in the Booth and Tarble cases, was recently properly recognized by the Supreme Court of California, when upon the return of the writ of habeas corpus in Terry's case, it appearing, that he was in custody by virtue of a judgment of the United States Circuit Court, it declined to require the Sheriff to produce his body. As the powers and duties of the State and National courts are by no means reciprocal, in this class of cases, so they are not reciprocal in the matter of territorial jurisdiction mentioned, as claimed on the part of the State. The Constitution and laws of the United States, as to those matters wherein they are supreme, extend over every foot of the territories of the United States, and the jurisdiction of its courts to enforce rights derived thereunder, is as extensive as the territory to which they are applicable.

In Siebold's case, the Supreme Court, in reply to an argument in favor of a wide extension of State rights, uses the following language, peculiarly applicable to the point now under consideration: "Somewhat akin to the argument which has been considered is the objection, that the Deputy Marshals authorized by the Act of Congress to be created and to attend the elections are *authorized to keep the peace*; and that this is a duty which belongs to the State authorities alone. It is argued *that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belongs exclusively to the States.* Here, again, we are met with the theory that the Government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that Government. We hold it

to be an incontrovertible principle, that the Government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent."

"This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the Constitution itself show which is to yield. 'This Constitution, and all laws which shall be made in pursuance thereof, shall \* \* \* be the supreme law of the land.'" (100 U. S., 394-5). And again, "The argument is based on a strained and impracticable view of the nature and powers of the National Government. *It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have the power to command obedience, to preserve order and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction.*" (Id. 396). The power to keep the peace is a police power, and the United States has the power to keep the peace in matters affecting their sovereignty.

There can be no doubt, then, that the jurisdiction of the United States is not affected by reason of the place—the locality—where the homicide occurred. If the locality is a necessary element of jurisdiction, a majority of the offenses created by the statutes would be out of their jurisdiction, and the statutes creating such offenses would be nullities, and practically useless.



For example, for a quarter of a century the United States Courts in this State were held in rented buildings, owned by private parties. They had no jurisdiction over them under the provision of Section 8, Article I, of the National Constitution; and no jurisdiction other than that had over other portions of the country to which the Constitution and its laws extended. Had an assault been committed in open Court upon the Judge, in one of these buildings, and the assailing party been slain by the Marshal in protecting the Judge, under circumstances excusing or justifying the homicide, would it be pretended that the Court would have no jurisdiction to protect him from interference by the State Government? Or have the United States and their courts no jurisdiction over the offense of resisting a United States Marshal in the lawful execution of the process of the courts? or over the crime of counterfeiting the coin or forging the bonds or other securities of the United States, or other offenses against the laws, unless the offense is committed in a place under the exclusive jurisdiction of the United States? Such a claim would be preposterous.

In the case of *Tennessee vs. Davis*, the defendant was indicted for murder in killing one Haynes, while he was engaged in discharging his duties as a Deputy Collector of Internal Revenue of the United States, and which killing Davis claimed was in self-defense. The case was removed to the Circuit Court of the United States under Section 643, R. S. It was contended that this act was an encroachment upon State rights, since it took away the right of the State to determine and execute its own criminal laws; and was, therefore, unconstitutional. The Supreme Court sustained the act. It was held "that the United States is a government with authority extending over all the territory of

the Union, acting upon the State and the people of the State." In deciding the case the Court said: "As was said in *Martin vs. Hunter*, (1 Wheat. 363), the 'general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers.' It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the laws of the State, yet warranted by the Federal authority they possess, and if the general government is powerless to interfere at once for their protection; if their protection must be left to the action of the State court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the government. And even if, after trial and final judgment in the State court, a case can be brought into the United States court for review, *the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested.*"

"We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its *sovereignty* extends it is supreme. No State government

can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it." *Tennessee vs. Davis*, 100 U. S., 262-3.

These expositions of the territorial extent of the jurisdiction of the General Government are authoritative and conclusive, and the result is that wherever the Constitution and laws of the United States operate at all, the State laws in conflict with them are subordinate, and those of the United States are supreme and paramount.

Numerous cases are reported in the books, wherein parties arrested for offenses under the State laws, for acts performed in the discharge of duties imposed by the laws of the United States, have been discharged from imprisonment on *habeas corpus* by the United States courts, in consonance with these principles, now authoratively established by the Supreme Court of the United States, in the cases cited, and others in the same line.

Thus, in *ex parte Jenkins*, and others, Deputy United States Marshals, who were arrested on the warrant of a justice of the peace in Pennsylvania, for shooting and wounding a negro, who resisted an arrest attempted under a warrant issued by the United States Court for a fugitive slave, Mr. Justice Grier of the United States Circuit Court, took jurisdiction and discharged the petitioners, under the Act of 1835, since carried into the Revised Statues, as part of section 753, under which this case arises. After their discharge, they were arrested again, in a suit by the negro for trespass, upon a warrant issued by a judge of the Supreme Court of Pennsylvania, and again discharged on *habeas corpus* by the United States Cir-

cuit Court. After this they were indicted for the shooting and wounding of the negro by the grand jury of Luzerne County, and a third time released on habeas corpus. *Ex parte Jenkins*, 2 Wall., Jr. p. 521, *et seq.* In the first of these cases Mr. Justice Grier observes, "What then have we power to do on the return of the writ?"

"The writ of habeas corpus is a high prerogative writ known to the common law: the great object of which is the liberation of those who may be in prison without sufficient cause. It is in the nature of a writ of error, to examine the legality of the commitment. It brings the body of the prisoner up, together with the cause of his commitment. The Court can, undoubtedly, inquire into the sufficiency of that cause."

\* \* \* "Warrants of arrest issued on the application of private informers, may show on their face a *prima facie* charge sufficient to give jurisdiction to the justice; but it may be founded on mistake, ignorance, malice, or perjury. To put a case very similar to the present—A tells B that he has seen C kill D. B runs off to a justice, swears to the murder boldly, without any knowledge of the facts, and takes out a warrant for C, who is arrested and imprisoned in consequence thereof. C prays a habeas corpus, and shows that he was the sheriff of the county, and hanged D in pursuance of a legal warrant. If a court could not discharge a prisoner in such a case because the warrant was regular on its face the writ of habeas corpus is of little use."

"The authority conferred on the judges of the United States by this Act of Congress gives them all the power that any other court could exercise under the writ of habeas corpus, or gives them none at all. If under such a writ they may not discharge their officer, when imprisoned 'by any authority,' for an act



done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed. Is the prisoner to be brought before them only that they may *acknowledge their utter impotence to protect him?*” \* \* \*

In *ex parte Robinson* Mr. Justice McLean held that “a writ of habeas corpus may issue to relieve an officer of the Federal Government who has been imprisoned under State Authority for the performance of his duty.” (6 McLean, 355.) In the course of the decision the learned Justice observes: “It is a general principle of law, to which I know of no exception, that the laws of every government shall be construed by itself; and such construction is acted upon by ‘the judiciary of all other countries. By the Federal Constitution the judicial power of the United States is declared to be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time order and establish.’ Under this provision the judiciary of the Union gives a construction to the laws which is obligatory on the State tribunals. The Constitution again declares, ‘the Constitution and laws of the United States which shall be made in pursuance thereof, and all treaties made or which shall be made under the authority of the United States, shall be the supreme law of the land; and the judges in every State shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.’” (Id. 362.) Thus, it is the exclusive prerogative of the National Courts to finally determine whether an act performed by one of the officers of the United States, and especially an officer of the Court itself, is done in pursuance of a law of the United States, or whether, when under arrest for acts per-

formed in connection with his office, he is "in custody in violation of the Constitution or of a law of the United States."

In the case of *Roberts vs. Jailer* of Fayette County, Kentucky, 2 Abb., 365, a special Deputy United States Marshal was arrested, under the State laws, on a charge of murder, for a homicide committed by him in attempting to arrest one Cull upon a warrant issued by a Commissioner of the United States Circuit Court, for offenses charged to have been committed under the internal revenue laws. Upon the hearing, the United States Circuit Court found that the homicide was committed in the performance of "an act done in pursuance of a law of the United States, or of a process of a court or judge of the same," and discharged the petitioner. The question of the jurisdiction of the Court, and the facts, were elaborately discussed.

So, *In re Ramsey*, 2 Flippin, 451, the prisoner was a Deputy United States Marshal, in custody by order of a State Court, on a charge of murder, the homicide having been committed in an attempt to arrest, upon a warrant issued by the United States courts, the party slain. The Court found that the act was done in pursuance of a law of the United States; that petitioner was justified in the act which he performed, and discharged him. See, also, to the same effect, *In re Neill*, 8 Blatch, 167. *In re Farrand*, 1 Abb., 140; Electoral College of South Carolina, 1 Hughes, 571: *In re Hurst*, 2 Flip. 510, and cases collected in vol. 29 Myers, Fed. Decisions, 698. Thus it appears to be settled, beyond controversy, that, where a party is in custody by State authority, for an act done, or omitted to be done, in pursuance of any specific provision of a statute of the United States, imposing a duty upon him, or for an act performed justifiable by the circumstances of the case, in order to enable him

to perform that duty, or in the execution of any order, or process, or decree, of a Court of the United States, or of a judge thereof, the courts of the United States have jurisdiction to discharge him on habeas corpus, under Section 753 of the Revised Statutes. In such a case, the laws of the United States are supreme, and the act cannot be an offense against the laws of the State, and as we have before seen, whether an act is performed in pursuance of a law of the United States, is a question exclusively for the United States Courts to authoritatively and conclusively determine. They must interpret finally the laws of the United States. With their decision the State cannot interfere. When the United States Courts have spoken on the subject, the State has nothing more to do with it.

The only remaining questions to determine are:

1. Was the homicide now in question, committed by petitioner, while acting in discharge of a duty imposed upon him by the Constitution or laws of the United States, within the meaning of Section 753 of the Revised Statutes?

2. Was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time, and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?

It is urged that there is no statute, which, specifically, makes it the duty of a Marshal, or a Deputy Marshal, to protect the Judges of the United States Courts while out of the court-room, traveling from one point to another in the Circuit, on official business, from the violence of litigants, who have become offended at adverse decisions made by such judges in the performance of their judicial duties, and that

Marshals, or deputies, so engaged, are not within the provisions of Section 753 of the Revised Statutes.

It will be observed that the language of the provision of Section 753 is "an act done \* \* \* in pursuance of a *law* of the United States," not in pursuance of a *statute* of the United States.

The statutes of Congress, in their express provisions, do not present all the law of the United States. Their incidents and implications are as much a part of the law as their express provisions. When they prescribe duties, provide for the accomplishment of certain designated objects, or confer authority in general terms, they carry with them all the powers essential to effect the ends designed.

Says the Supreme Court in *Tennessee vs. Davis*, 100 U. S., 264, quoting with approbation from Chief Justice Marshall:

" ' It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an Act of Congress to imply, without expressing, this very exemption from State control.' \* \* \* "The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. *It has never been doubted that all who are employed in them are protected while in the line of their duty; and yet this protection is*



*not expressed in any Act of Congress.* It is incidental to, and is implied, in the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone—that is, the judicial power is the instrument employed by the government in administering this security.’ ”

If the officers referred to in the preceding passage are to be protected while in the line of their duty, without any special law or statute requiring such protection, are not the judges of the courts—the principal officers in a department of the government second to no other—also to be protected, and are not their executive subordinates—the marshals and their deputies—to be shielded from harm by the national laws, while honestly engaged in protecting the heads of the courts from assassination? When it was argued in Siebold’s case that it was not in the power of the United States to authorize the United States Marshals to “*keep the peace*” at Congressional elections, “*that the preservation of peace and good order in society is not within the powers confided to the Government of the United States, but belonged exclusively to the State,*” we have seen the answer of the Supreme Court to that argument, in cases where the rights and interests of the *United States Government* were involved in the matter of keeping the peace. “We hold it to be an incontrovertible principle,” said the Court, “that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. And again, “Why do we have marshals at all if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can

they perform, if they cannot use force? In executing the processes of the courts, must they call upon the nearest constable for protection? Must they rely upon him to use the requisite compulsion, and to keep the peace whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and re-refining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation." 100 U. S., 395-6.

In this particular case the petitioner, long before he reached Lathrop, endeavored through the conductor and the proprietor of the eating-house at that place, to have "*a constable*" in readiness, on the arrival of the train, *to keep the peace*, but without success. When too late to prevent the tragedy the constable appeared and arrested the petitioner, for performing the duty which it is now claimed devolved exclusively upon himself, or some other peace officer of the State.

Had the United States in this instance relied upon another government—the State of California—to keep the peace as to one of their most venerable and distinguished officers—one of the Judges of their highest court—in relation to matters concerning the performance of his official duties, they would have leaned upon a broken reed, and there would now in all probability be a vacancy on the bench of one of the most august judicial tribunals in the world, and the deceased—the would-be assassin—might, perhaps, be a tenant of the Stockton jail, to be disposed of by another govern-

ment. The case affords a striking illustration of the necessity for the United States to protect their own officers while in the discharge of their duties, and by such protection protect the nation itself.

The result was, that instead of arresting the conspirator in the contemplated murder—the wife of the deceased, armed with a loaded revolver till relieved of it by a citizen—threatening death to Justice Field, calling upon the bystanders to aid her, and attempting to enter the car, with the avowed purpose of compassing his death, the officer of the United States assigned by his government to the special duty of protecting the justice's life against these very parties, while in the actual performance of the duties so assigned him, was, himself, arrested, without warrant, and disarmed by an inferior officer of the State, and interrupted in the discharge of those momentous duties, thereby leaving his charge helpless, and without the protection provided by the government he was serving at a time when such protection seemed most needed.

Had Neagle been a Deputy Sheriff of San Joaquin County assigned by his superior to this very duty of protecting the life of Justice Field, under the State laws, and in the performance of his duties committed the homicide in all other respects under precisely the same circumstances, would he have been arrested by the constable of Lathrop, without a warrant, and disarmed with such inconsiderate haste, and thereby prevented from further performing his duty to protect the life and person of Justice Field, leaving him to pursue the remainder of his journey without protection? Yet the constable was informed that Neagle was acting as a Deputy United States Marshal, under the orders of his superiors, for the protection of the life and person of a Justice of the Supreme Court of the United States.

We do not wish to be regarded as now calmly and deliberately looking back upon the scene, and sitting in judgment upon the action of the constable or as passing censure upon his zeal. He, doubtless, in the emergency, where time for consideration was short, and the facts not fully appreciated, acted according to the best dictates of his judgment necessarily hastily formed. But when the State now comes in after an arrest upon a warrant issued upon such flimsy testimony as that presented, and deliberately claims the exclusive right to sit in judgment upon the acts of the United States Deputy Marshal, performed not upon his own interpretation of the law, but upon that of the Attorney-General of the United States, who may be presumed to possess some knowledge of his powers and duties, it is well to consider the circumstances from a standpoint presenting a view of both sides of the question.

In matters of the public peace, in which the National Government is concerned, the Marshals and Deputy Marshals, within the scope of their authority, *are national peace officers*, with all the statutory and common law powers appertaining to peace officers. Is not the national public peace involved, when a deadly assault is unexpectedly made upon a Judge in open Court, in which the Marshal, and his deputies, seeing the assault, are both authorized and bound on their own motion, without any previous order or command, to interpose, and use sufficient force to quell the disturbance, and subdue the parties making it? Yet where is there any specific provision of the statute imposing that duty upon them? The Marshal is required to attend Court, but it is not provided what he shall do in Court. To what end shall he be in Court if not to keep order, and if necessary, to protect the Judges from violence, by force, or any practicable means? But there is no statute requiring it in terms.



The general duties of marshals are provided for in Section 787, which reads as follows: "It shall be the duty of the marshal of each district to attend the District and Circuit Courts when sitting therein, and execute throughout the district, all lawful precepts directed to him, and issued under the authority of the United States; and he shall have power to command all necessary assistance in the execution of his duty." There is no more authority specifically conferred upon the Marshal by this section to protect the Judge from assassination, in open Court, without a specific order or command, than there is to protect him out of Court, when on the way from one Court to another, in the discharge of his official duties. And the assassination in Court, as well as out of it, might well be accomplished before the Judge would be aware of his danger, and before it would be possible to give a command or order to the Marshal for his protection. The authority exists in the one case, as in the other, from the nature of the office, and the powers arising under the common law, recognized and in use in the country, and in the nature of things, inherent in the office. The very idea of a government composed of executive, legislative and judicial departments, necessarily comprehends the power to do all things through its appropriate officers and agents, within the scope of its general governmental purposes and powers requisite to preserve its existence, protect it and its ministers and give it complete efficiency in all its parts. It necessarily and inherently includes power in its executive department to enforce the laws, keep the national peace with regard to its officers while in the line of their duty, and protect by its all-powerful arm all the other departments and the officers and instrumentalities necessary to their efficiency while engaged in the discharge of their duties.

In language attributed to Mr. ex-Secretary Bayard, used with reference to this very case, which we quote, not as a controlling judicial authority, but for its intrinsic, sound, common sense: "The robust and essential principle must be recognized and proclaimed, that the inherent powers of every government which is sufficient to authorize and enforce the judgment of its Courts, are, equally, and at all times, and in all places, sufficient to protect the individual Judge who, fearlessly and conscientiously in the discharge of his duty, pronounces those judgments."

Our jurisprudence is derived from and founded upon that of England, and our Judges and officers are substantially the same. They have corresponding duties imposed upon them, and inherently possess corresponding executive powers, to enable them to effectively perform their duties. From the foundation of our Government, many of their common law duties have been performed, and common law powers exercised without specific or statutory direction, and without question; and the common law principles governing them, except so far as inapplicable, or modified by statute, still remain in force.

The observation of the Supreme Court of California, in the estate of Apple, 66 Cal. 434, in which State a Code has been adopted with respect to the common law not abrogated or modified by the Code, is applicable here. Said the Court: "The code establishes the law of this state respecting the subjects to which it relates; but this, of course, does not mean that there is no law with respect to such subjects except that embodied in the code. When the code speaks, its provisions are controlling, and they are to be liberally construed, with a view to effect its objects and promote justice—the rule of the common law that statutes in derogation thereof are to be strictly construed hav-

ing been abolished here; but where the code is silent, the common law governs." So here, where the duties of the Marshal are not limited, or specifically defined, by the statute, we must look to the powers and duties of Sheriffs at common law for them so far as those duties come within the purposes and powers of the national Government.

There are many acts and duties daily performed by the Marshals and by other officers that are not specifically pointed out or defined by the statute. The Marshals are in daily attendance upon the Judges, and performing official duties in their chambers. Yet no statute specifically points out those duties or requires their performance. Indeed, no such places as chambers for the Circuit Judges or Circuit Justices are mentioned at all in the statutes. The Judges' chambers do not appear to have any "local habitation." The Justices of the Supreme Court at Washington have, in fact, no chambers otherwise than as they study and do their work out of Court, at a room in their own residences. We have in the San Francisco courthouse rooms that we call chambers, in which the work of the Judges out of Court is in part, but not wholly, performed. I apprehend that the Marshal would as clearly be authorized to protect the Judges here in chambers as in the courtroom. All business done out of Court by the Judge is called chamber business. But it is not necessary to be done in what is usually called chambers. Chamber business may be done, and often is done, on the street, in the Judge's own house, at the hotel where he stops, when absent from home, or it may be done in transitu, on the cars in going from one place to another within the proper jurisdiction to hold court. Mr. Justice Field could, as well, and as authoritatively, issue a temporary injunction, grant a writ of habeas corpus, an order to show cause, or do any other

chamber business for the district in the dining-room at Lathrop, or in the cars, as at his chambers in San Francisco, or in the courtroom. He could have made a writ of habeas corpus returnable before himself on the car, and lawfully heard and decided the case while on his passage to San Francisco. The chambers of the Judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the Judge, and to suitors—places, where the Judge at proper times can be readily found, and the business conveniently transacted. But the chambers of the Judge, as a legal entity, is something of a myth. For the purposes of jurisdiction, the chambers of the Judge are wherever he happens to be in his circuit, or district, when the exigencies of the case call for the transaction of chamber business, and a Judge is as clearly engaged in the discharge of the duties of his office, when going from one place of holding court to another, for the purpose of holding court, and just as much entitled to protection from his own Government against murderous or other assaults, from desperate suitors, on account of his judicial action, as when actually engaged in business at chambers, or in holding court. In England, whence we derive our jurisprudence, the High Sheriff of the shire was the keeper of the King's peace—that is to say, the keeper of the peace of the sovereignty which the King represents. So here, I take it, under the authorities cited, the Marshal is the keeper of the peace of the Government of the sovereignty he serves, within the scope of the supreme powers of that Government. In England, in early days, it was the duty in every shire of the Sheriffs not only to attend the courts, but to attend the Judges through their circuits. They met the Judges at the border of the shire, and attended them until they left it at the border of another. Dalton, on the



Office and Authority of Sheriffs, chapter 98, p. 369, published in 1682. See also 40 Alb. Law Journal, 161. Such is also understood to have been the practice in early days in a number of the States. From the advancing state of civilization this practice has, doubtless, generally become unnecessary for the safety of the Judges, and it has fallen into desuetude. But it does not follow that the power to thus protect them has been abolished or become extinguished. It simply remains latent or dormant, ready to be called into action whenever the exigencies of the case or times require it. And how could there possibly be a more urgent occasion for reviving the practice and calling it into action, than the recent journey of Justice Field to Los Angeles and return on official business ?

Upon general, immutable principles, the power must necessarily be inherent in the executive department of any government worthy the name of government, to protect itself in all matters to which its authority extends, and this necessarily involves the power to protect all the agencies and instrumentalities necessary to accomplish the objects and purposes of that government. In the National Government of the United States the judiciary constitutes one of its most important branches. Unlike the judiciary of other nations it is invested with the jurisdiction to pass, finally and conclusively, upon the powers of the legislative and executive departments of the Government, and to confine them within their constitutional limits. It is, therefore, the balance wheel of the National Government, that keeps it running regularly and smoothly within its proper domain. Impotent, indeed, must be the executive branch of the government, if it is not empowered to protect the lives of the Judges of the highest branch of its judiciary, from assault and assassination, on account of their judicial decisions, by desperate disappointed

litigants, while passing from point to point within their territorial jurisdiction in the discharge of their high functions and duties. We cannot think the power can be wanting, even if there were no constitutional or statutory provision governing the case. It seems impossible that the National Government should be left to the mercy, good will, or complacency of the State, to afford that protection to its Judges that the United States, if worthy to be called a nation, are bound themselves to furnish.

As a further example of laws, not ordained by specific statutory enactments, see those respecting punishment for contempts. For forty years after the organization of the National Government, down to 1831, there was no Statute which specifically defined contempts of court. *Ex parte Robinson*, 19 Wal., 510; *ex parte Terry*, 128 U. S., 302-3; *ex parte Savin*, 131 U. S., 275. But the courts, nevertheless, exercised the power, necessarily, from the nature of things inherent in every court, to protect itself, its dignity and its officers, by the punishment of many acts as contempts of its authority. The first specific Act upon the subject passed by Congress was not an Act enlarging the power of the court, but it was, on the contrary, a restriction of the powers already exercised within certain defined limits. The act was passed at the instance of Senator Buchanan, to limit the power of the court theretofore exercised, to punish for contempts, as a sequel to the impeachment of a United States Judge for the District of Missouri. The Act was passed March 2, 1831, and is entitled, "An Act declaratory of the law concerning contempts of Court." 4 U. S. Stat. at Large, 487. The first section does not *grant* the power to punish for contempts, but expressly recognizes the existing power, and, in express terms thereafter, limits the

power to certain enumerated cases. In order that those who were before subject to punishment for contempt should not escape the penalties due their acts, section 2 of the statute makes certain acts, before punishable as contempts, offenses against the laws of the United States, punishable by the less summary and more deliberate proceeding on indictment and trial by a jury. Many of the acts under that Act, recognized as punishable as contempts, as being necessary to the prompt and summary vindication of the authority of the court, are also indictable offenses under other statutes.

This Statute of 1831 has been carried into the Revised Statutes, Section 1 of that Act having been re-enacted in Section 725 of the Revised Statutes, giving it a granting, as well as a restricting, form, but in no sense changing its purpose or meaning. And Section 2 is now found in Section 5399 of the Revised Statutes, as a part of the criminal code of the nation.

Did anybody ever doubt, or does anybody now doubt, that the power of the United States Courts to punish contempts, from the organization of the government down to 1831, was just as ample, and that it was just as much a part of the law of the United States, inherently, vested in the courts, as it was after the passage of the Act of 1831, or as it is now under the same provisions carried into the Revised Statutes?

Yet, there was no specific provision of the statutes defining contempts. It was a power, however necessarily, inherent in the courts. It is involved in the very idea of a court, having power to administer the laws of the land. It would be impossible for courts to perform their functions and administer the laws without it. And as so inherent, the power to punish various acts not mentioned for contempt was as much a part of the law of



the United States as if ordained by a specific provision of the Statute of the United States, and the authority of the Marshal to protect the Judges is a cognate power, also, necessarily, inherent in the office he holds. Thus there is much law of the United States not now found in terms in the statutes, but as valid and binding upon the people and upon the States as if it were specifically and definitely therein expressed. See *U. S. vs. Hudson*, 7 Cr., 32-4. *Matter of Meador*, 1 Abb., 324. *In re Buckley*, 69 Cal., 18.

But we are not without constitutional and statutory provisions, broad enough and specific enough, as we think, to cover the case. The National Constitution, providing a government for sixty-five millions of people, covers but a very few pages, but it seems to be amply sufficient for the purposes intended. In prescribing the duties of the President, in the terse but comprehensive language of section 3, article II, it provides that "he shall take care that the laws be faithfully executed." This makes him the executive head of the nation, and gives him all the authority necessary to accomplish the purposes intended—all the authority necessarily inherent in the office, not otherwise limited. Congress, in pursuance of powers vested in it, has provided for seven departments, as subordinate to the President, to aid him in performing the executive functions conferred upon him. Section 346, R. S., provides that, "one of the executive departments shall be known as the Department of Justice," and that there shall be "an Attorney-General, who shall be the head thereof." He has general supervision of the executive branch of the National Judiciary, and section 362 provides as a portion of his powers and duties, that "the Attorney-General shall exercise general superintendence and direction over the attorneys and marshals of all the



districts of the United States and Territories as to the manner of discharging their respective duties; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct." Section 788, R. S., provides that "The marshals and their deputies shall have, in each State, the same powers in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." By section 817 of the Penal Code of this State, the Sheriff is a "peace officer." By section 4176, Pol. Code, he is "to preserve the peace" and "prevent and suppress breaches of the peace." The Marshal is, therefore, in accordance with the decision of the Supreme Court already referred to, and under the provisions of the statute above cited, "a peace officer," so far as keeping the peace in any matter wherein the national powers of the United States are concerned, and as to such matters he has all the powers of the sheriff, as a peace officer under the laws of the State. He is, in such matters, "to preserve the peace" and "prevent and suppress breaches of the peace." An assault upon or an assassination of a judge of a United States Court while engaged in any matter pertaining to his official duties, on account or by reason of his judicial decisions, or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the Marshal or his deputies to prevent as a peace officer of the national government. Such an assault is not merely an assault upon the person of the judge, as a man. It is an assault upon the national judiciary, which he represents, and through

it an assault upon the authority of the nation itself. It is, necessarily, a breach of the national peace. As a national peace officer, under the conditions indicated, it is the duty of the Marshal and his deputies to prevent a breach of the national peace by an assault upon the authority of the United States, in the person of a judge of its highest court, while in the discharge of his duty. If this be not so, in the language of the Supreme Court before cited, "Why do we have Marshals at all?" What useful functions can they perform in the economy of the national government?

The Constitution of the United States provides for a Supreme Court, with jurisdiction more extensive in some particulars than that conferred on any other national judicial tribunal. If the Executive Department of the government cannot protect one of these Judges while in the discharge of his duty, from assassination, by dissatisfied suitors, on account of his judicial action, then it cannot protect any of them, and all the members of the Court may be killed, and the Court itself exterminated, and the laws of the nation by reason thereof, remain unadministered and unexecuted. The power and duty imposed on the President to "take care that the laws are faithfully executed," necessarily carries with it all power and authority necessary to accomplish the object sought to be attained, and, certainly, the power and duty to protect from the deadly assaults of desperate suitors, the lives of the Judges of the highest Court in the nation, while engaged in the lawful discharge of their duties.

As we have before seen, neither Constitution nor statutes can, or do, anticipate and point out, specifically, every possible right or duty to be covered and secured. They must, necessarily, be general. In the

passage already cited from *Tennessee vs. Davis*, the Supreme Court, in speaking of certain officers, says: "It has never been doubted, that all who are employed in them are protected while in the line of their duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which those institutions are created; and is secured to the individuals employed in them by the judicial power alone; that is, the judicial power is the instrument employed by the government in administering this security." (100 U. S., 265). And in *United States vs. Macdaniel*, 7 Pet., 14, similar views were expressed. Said the Court: "A practical knowledge of the action of any one of the great departments of the government must convince every person that the head of a department, in the distribution of its duties and responsibilities, is often compelled to exercise his discretion. He is limited in the exercise of his powers by law; but it does not follow that he *must* show a statutory provision for every thing he does. *No government could be administered on such principles.* \* \* \* *There are numberless things which must be done, that can neither be anticipated nor defined, and which are essential to the proper action of the government.*" These observations are especially, and forcibly applicable to the terse but very comprehensive provisions of the Constitution and of the several statutes cited, as to the powers and duties of the President, the Attorney-General and Marshals.

The act of the Attorney General in directing the United States Marshal to protect the life of Mr. Justice Field against the assaults of the deceased and his wife, is in legal contemplation the act of the President. The President speaks and acts through the heads of the several executive departments in relation to subjects which appertain to their respective duties. They are but the subordinates of the President, wielding his

power. (*Wilcox vs. Jackson*, 13 Pet., 513; *United States vs. Cutler*, 2 Curtis, 617). In the former case, relating to a reservation of land by the Secretary of War, the court said, "Now although the immediate agent in requiring this reservation was the Secretary of War, yet we feel justified in presuming that it was done by the approbation and direction of the President. The President speaks and acts through the heads of the several departments in relation to subjects which appertain to their respective duties." See also 7 Attorney General's Opinions, 480-1, id. 433-479. Confiscation cases, 20 Wal., 108-9, *United States vs. Eliason*, 16 Pet., 291.

By Section 788 R. S., and the several provisions of the Statutes of California herein cited, the United States Marshal is made a peace officer and as such he is authorized to preserve the peace, so far as a breach of the peace affects the authority of the United States and obstructs the operations of the government and its various departments. The courts must, from the nature of things, be enabled fully to perform all their functions imposed upon them by the Constitution and laws without hindrance or obstruction, and they must have the inherent power to protect themselves by, and through their executive officers, under the direction and supervision of the Attorney-General and the President, against obstruction and hindrance in the performance of their judicial duties. An assault upon a Judge in Court, or a Judge out of Court, while in the performance of his duty, induced by his judicial action, and intended or calculated to obstruct him in, or deter him from, a free and full discharge of his duty, is a breach of the national peace affecting the sovereignty of the nation, and tending to obstruct *and impair* the operations and efficiency of one of the most important departments of the government. As such, it is the



duty of the United States Marshal, under the police powers of the nation so conferred upon him, by the statutes cited, and as a national peace officer, to prevent such breach of the peace. Under the State laws deputy sheriffs, when occasion requires, constables and police officers of cities are assigned to certain districts to watch over the safety of the citizens and to guard and protect their persons and property from assault, destruction or injury, *in short to prevent the commission of crimes*, etc. These officers in cities are found everywhere, night and day, guarding the citizen and his property from injury. So the Attorney-General, under the provisions of the statute cited, and the President under the provisions of the Constitution, requiring him to see that the laws are faithfully executed, are authorized and empowered to direct the assignment by the marshal, of any deputy to perform any special national police duty within his jurisdiction, arising out of the statutes, whether by express provision or necessary implication, and under any power, necessarily inherent in the President and government, in order to give full effect and efficiency to the government, or any of its departments. It has never, so far as we are advised, been doubted that a Marshal or Deputy Marshal is authorized to protect a Judge, and preserve order in open court, even by the use of force, without any special order or command, as a part of the duties necessarily inherent in his office; yet, as we have already seen, there is no more specific statutory authority for so preserving order, and protecting the Judge in court, than for performing the same duty, under proper conditions, for a Judge engaged in performing his duties, of whatever nature out of court.

It is argued by one of the counsel on behalf of the State that these matters pertain exclusively to the peace of the State, and that the State has not only

power to preserve the public peace, but that it is amply capable of performing this service, that it is its duty to do it; that the threats of the deceased were matters of public notoriety; and that by calling the powers of the State into action, Justice Field's life might have been protected by the State, and there would have been no necessity whatever for what is called on the part of the State, the illegal action of the United States Marshal. It may be conceded, and it is undoubtedly true, that it was an imperative duty of the State to preserve the public peace, and to amply protect the life of Mr. Justice Field, *but it did not do it*. Where would Mr. Justice Field have been to-day, had he relied solely upon the State to perform her conceded imperative duty?

Not having performed that obligation while on his journey in discharge of his judicial duties, does a complaint now come with a good grace from the State against the United States for performing it for her, as well as for the National Government, by protecting one of their most distinguished judicial functionaries through one of their own officers; in the only manner in which it could have been effectively performed?

In the present case, and on this official journey, there was a necessity for the kind of protection afforded Mr. Justice Field, for no other kind would have been adequate. The occasion required a preventive remedy.

The use of the State police force would have been impracticable, as the powers of the Sheriff would have ended at the borders of his county, and of other township and city peace officers, at the boundaries of their respective townships and cities. Only a United States Marshal, or his deputy, could exercise these official functions throughout the United States judicial district, and as we have seen, the powers exercised concern

matters affecting the peace of the National Government, and if the National Government has no authority to act in the premises it certainly ought to have such power.

The only remedy suggested on the part of the State was to arrest the deceased and hold him to bail to keep the peace under Section 706 of the Penal Code, the highest limit of the amount of bail being \$5000. But although the threats are conceded to have been publicly known in the State, no State officer took any means to provide this flimsy safeguard.

Perhaps counsel intended to intimate that it was not the duty of the State, but of Mr. Justice Field himself to set in motion proceedings under the law furnished by the State, to put the decedent under bonds to keep the peace. Has it come to this, then, that a Justice of the Supreme Court of the United States, when in obedience to the behests of the law, he comes to California to perform his judicial duties, must submit to the humiliation of immediately upon his arrival, stealing away to some justice of the peace and instituting proceedings to bind over to keep the peace vindictive and dangerous litigants who have threatened his life? But what security to Mr. Justice Field would a bond of \$5000 afford against resolute, violent and desperate parties, for whom the penalties for murder have no deterring power? The United States Marshal, the United States Attorney for the District of California, the Attorney-General of the United States at Washington, and the mass of the people of California thought that the exigencies of the occasion required something more, and the result fully justified their view of the matter.

Although no adequate means of protection were afforded by the State on his late official journey, and Mr. Justice Field would, in all probability, not now

be among the living had not the petitioner, by the wise forethought of the Attorney-General, been detailed to protect his life, yet the fact of the failure of the State to perform its duty, does not afford any reason for taking the petitioner out of the custody of the State, unless, in committing the homicide, he was engaged in the performance of "an act done \* \* \* in pursuance of a law of the United States," and the killing was justifiable. The failure to perform its duty would not, alone, oust the jurisdiction of the State, if it be exclusive. But since the possible remedy mentioned under the State law was alluded to by counsel as ample, we refer to it as illustrating the necessity for a speedy amendment of the laws of the United States, if they are now so defective as to afford no protection to the United States Judges in the performance of their high functions.

It is apparent to us, if he is not now so protected, that the distinguished Justice allotted to the Ninth Circuit, and also his associates, should have thrown over them the protecting ægis of the laws of that government which he has so long, faithfully and efficiently served.

After mature consideration, we have reached the conclusion that the homicide in question was committed by petitioner while acting in the discharge of a duty imposed upon him by the Constitution and laws of the United States, within the meaning of the provisions of Section 753 of the Revised Statutes.

It only remains to inquire, secondly, was the homicide necessary, or was it reasonably apparent to the mind of the petitioner, at the time and under the circumstances then existing, that the killing was necessary in order to a full and complete discharge of such duty?



The answer to this proposition is really included in the answer to the last, but we desire to make some observations bearing especially upon it.

The Attorney-General and counsel for the State declined to discuss the question as to whether the homicide was justifiable, because, in their view, this is a question solely for the State Court, the case, as claimed by them, not being within the provisions of section 753 of the Revised Statutes, and, therefore, not within the jurisdiction of this Court. Holding, as we do, that the case falls within those provisions, so far as the petitioner was authorized to act, by the Constitution and laws of the United States, it becomes necessary to determine whether the homicide was justifiable. For, if it was malicious, wanton or reckless, without any reasonable apparent necessity in order to fully and properly perform his duty of protecting Justice Field, then it was an act performed beyond and outside his duty, and he is amenable to the State Courts.

The facts set forth in the petition, and in the traverse to the return of the Sheriff, are fully and satisfactorily proved by the testimony, and whether we determine the case upon demurrer to the traverse, or upon the whole case, as presented in the record and evidence, the result must be the same.

Were the question of justification to be determined by the laws of the State of California, or in the State Court, there could be no ground for doubt. Says the Penal Code: "Homicide is also *justifiable* when committed by any person when resisting any attempt to murder any person, \* \* \* or to do some great bodily injury upon any person." (Sec. 197, Penal Code.) But we shall consider the question without reference to the statute of California.

It is unnecessary to repeat the facts in full. When the *deceased* left his seat, some thirty feet distant, walked stealthily down the passage in the rear of Justice Field and dealt the unsuspecting jurist two preliminary blows, doubtless by way of reminding him that *the time for vengeance* had at last come, Justice Field was already at the traditional "wall" of the law. He was sitting quietly at a table, back to the assailant, eating his breakfast, the side opposite being occupied by other passengers, some of whom were women, similarly engaged. When, in a dazed condition, he awoke to the reality of the situation and saw the stalwart form of the deceased with arm drawn back for a final mortal blow, there was no time to get under or over the table, had the law, under any circumstances, required such an act for his justification. Neagle could not seek a "wall" to justify his acts without abandoning his charge to certain death. When, therefore, he sprang to his feet and cried, "Stop! I am an officer," and saw the powerful arm of the deceased drawn back for the final deadly stroke instantly change its direction to his left breast, apparently seeking his favorite weapon, the knife; and at the same time heard the half-suppressed disappointed growl of recognition of the man who, with the aid of half a dozen others, had finally succeeded in disarming him of his knife at the courtroom a year before, the supreme moment had come, or, at least, with abundant reason, he thought so, and fired the fatal shot. The testimony all concurs in showing this to be the state of facts, and the almost universal consensus of public opinion of the United States seems to justify the act. On that occasion, a second, or two seconds, signified, at least, two valuable lives, and a reasonable degree of prudence would justify a shot one or two seconds too soon, rather than a fraction of a second too late. Upon

our minds the evidence leaves no doubt whatever that the homicide was fully justified by the circumstances.

We have seen in an eastern law journal, but with its disapproval, some adverse criticism upon the action of the petitioner, attributed to a quarter ordinarily entitled to great consideration and respect. But it is not for scholarly gentlemen of humane and peaceful instincts—gentlemen, who, in all probability, never in their lives, saw a desperate man of stalwart frame and great strength in murderous action—it is not for them sitting securely in their libraries, 3000 miles away, looking backward over the scene, to determine the exact point of time when a man in Neagle's situation should fire at his assailant, in order to be justified by the law. It is not for them to say that the proper time had not yet come. To such, in all probability, the proper time would never come. Neagle on the scene of action, facing the party making a murderous assault, knowing by personal experience his physical powers, and his desperate character; and by general reputation, his life-long habit of carrying arms, his readiness to use them, and his angry, murderous threats, and seeing his demoniac looks, his stealthy assault upon Justice Field from behind, and, remembering the sacred trust committed to his charge—Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come, and if he, honestly, acted with reasonable judgment and discretion, the law justifies him, even if he erred. But who will have the courage to stand up in the presence of the facts developed by the testimony in this case, and say that he fired the smallest fraction of a second too soon?

In our judgment he acted, under the trying circumstances surrounding him, in good faith and with consummate courage, judgment and discretion. The

homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense—commendable. This being so, and the act having been “done \* \* \* in pursuance of a law of the United States,” as we have already seen, it cannot be an offense against, and he is not amenable to, the laws of the State.

Let the petitioner be discharged.

SAWYER, Circuit Judge.

SABIN, District Judge.

September 16th, 1889.

















The Constitutional power of the Federal Government, through its executive department, to protect the Judges of the United States Courts from the revengeful and murderous assaults of defeated litigants without subjecting its appointed agents to malicious prosecution, for their fidelity to duty, by State officials—asserted and maintained.

---

OPINION  
OF THE  
UNITED STATES SUPREME COURT  
IN RE NEAGLE.

Delivered at October Term, 1889,\*

BY  
MR. JUSTICE MILLER.

---

An appeal from the decision of a Circuit Court of the United States in a *habeas corpus* case, under Rev. Stat. § 764, as amended by the act of March 3, 1885, 23 Stat. 437, c. 353, brings up the whole case, both law and facts, and imposes upon this court the duty of reëxamining it, upon the full record as it was heard in the inferior court.

A person who is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process or decree of a court, or judge thereof, or is in custody in violation of the Constitution, or a law or treaty of the United States, may, under the provisions of Rev. Stat. § 753, be brought before any court of the United States, or justice or judge thereof, by writ of *habeas corpus*, for the purpose of an inquiry into the cause of his detention; and the court or justice or judge is required by § 761 to proceed in a summary way to determine the facts of the case, by hearing the testimony and arguments, and thereupon to dispose of the party as law and justice require.

By virtue of Rev. Stat. §§ 608, 610, the justices of the Supreme Court of the United States are allotted among the nine circuits, to each one of which a judge is assigned; and the latter section makes it the duty of each judge to attend the Circuit Court in each district of the circuit to which he is allotted, and thereby imposes upon him the necessity of travelling from his residence to the Circuit Court which he is to attend, and from each place in that circuit where the court is held to the other places where it is held. *Held*, that, while a judge is thus travelling to or from those places, he is as much in discharge of his duty as when listening to and deciding cases in open court, and is as much entitled to protection in the one case as in the other.

---

\* Reported in 135, U. S. 1.

While there is no express statute authorizing the appointment of a deputy marshal, or any other officer to attend a judge of the Supreme Court when travelling in his circuit, and to protect him against assaults or other injury, the general obligation imposed upon the President of the United States by the Constitution to see that the laws be faithfully executed, and the means placed in his hands, both by the Constitution and the laws of the United States, to enable him to do this, impose upon the Executive department the duty of protecting a justice or judge of any of the courts of the United States, when there is just reason to believe that he will be in personal danger while executing the duties of his office.

An assault upon a judge of a court of the United States, while in discharge of his official duties, is a breach of the peace of the United States, as distinguished from the peace of the State in which the assault takes place.

Under the provisions of Rev. Stat. § 788, it is the duty of marshals and their deputies in each State to exercise, in keeping the peace of the United States, the powers given to the sheriffs of the State for keeping the peace of the State; and a deputy marshal of the United States, specially charged with the duty of protecting and guarding a judge of a court of the United States, has imposed upon him the duty of doing whatever may be necessary for that purpose, even to the taking of human life.

United States officers and other persons, held in custody by State authorities for doing acts which they were authorized or required to do by the Constitution and laws of the United States, are entitled to be released from such imprisonment; and the writ of *habeas corpus* is the appropriate remedy for that purpose.

David Neagle, a deputy marshal of the United States for the District of California, was brought by writ of *habeas corpus* before the Circuit Court of that District, upon the allegation that he was held in imprisonment by the sheriff of San Joaquin County, California, on a charge of the murder of David S. Terry. He alleged that the killing of Terry by him was done in pursuance of his duty as such deputy marshal in defending the life of Mr. Justice Field, while in discharge of his duties as Circuit Judge of the ninth circuit. On the trial of this writ in the Circuit Court it entered an order discharging the prisoner, finding that he was in custody for an act done in pursuance of a law of the United States, and was imprisoned in violation of the Constitution and laws of the United States. The case being brought up to the Supreme Court by appeal, this court, on examining the voluminous testimony, arrived at the conviction that there was a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Mr. Justice Field, on his official visit to California in the summer of 1889; that this arose from animosity against him on account of judicial decisions made in the Circuit Court of the



United States for the Northern District of California in a suit or suits to which they were parties; that the purpose which they had of doing Mr. Justice Field an injury became so well and so publicly known that a correspondence ensued between the marshal and the District Attorney of that District and the Attorney General of the United States, the result of which was that Neagle was appointed a deputy marshal for the express purpose of guarding Mr. Justice Field against an attack by Terry and his wife which might result in his death; that such an attack did take place; that Neagle, being there for the said purpose of affording protection, had just reason to believe that the attack would result in the death of Mr. Justice Field unless he interfered; and that he did justifiably interfere by shooting Terry while in the act of assaulting Mr. Justice Field, whom he had already struck two or three times. *Held*,

- (1) That Neagle was justified in defending Mr. Justice Field in this manner;
- (2) That in so doing he acted in discharge of his duty as an officer of the United States;
- (3) That having so acted, in that capacity, he could not be guilty of murder under the laws of California, nor held to answer to its courts for an act for which he had the authority of the laws of the United States;
- (4) That the judgment of the Circuit Court, discharging him from the custody of the sheriff of San Joaquin County, must therefore be affirmed.

This was an appeal by Cunningham, sheriff of the county of San Joaquin, in the State of California, from a judgment of the Circuit Court of the United States for the Northern District of California, discharging David Neagle from the custody of said sheriff, who held him a prisoner on a charge of murder.

On the 16th day of August, 1889, there was presented to Judge Sawyer, the Circuit Judge of the United States for the Ninth Circuit, embracing the Northern District of California, a petition signed David Neagle, deputy United States marshal, by A. L. Farrish on his behalf. This petition represented that the said Farrish was a deputy marshal duly appointed for the Northern District of California by J. C. Franks, who was the marshal of that district. It further alleged that David Neagle was, at the time of the occurrence recited in the petition and at the time of filing

it, a duly appointed and acting deputy United States marshal for the same district. It then proceeded to state that said Neagle was imprisoned, confined and restrained of his liberty in the county jail in San Joaquin County, in the State of California, by Thomas Cunningham, sheriff of said county, upon a charge of murder, under a warrant of arrest, a copy of which was annexed to the petition. The warrant was as follows :

“ In the Justice’s Court of Stockton Township.

“ STATE OF CALIFORNIA, }  
     *County of San Joaquin,* } ss.

“ The People of the State of California to any sheriff, constable, marshal, or policeman of said State or of the county of San Joaquin :

“ Information on oath having been this day laid before me by Sarah A. Terry that the crime of murder, a felony, has been committed within said county of San Joaquin on the 14th day of August, A. D. 1889, in this, that one David S. Terry, a human being then and there being, was wilfully, unlawfully, feloniously, and with malice aforethought shot, killed and murdered, and accusing Stephen J. Field and David Neagle thereof : You are therefore commanded forthwith to arrest the above-named Stephen J. Field<sup>1</sup> and David Neagle and bring them before me, at my office, in the city of Stockton, or, in case of my absence or inability to

---

<sup>1</sup> The Governor of California, on learning that a warrant had been issued for the arrest of Mr. Justice Field, promptly wrote to the Attorney General of the State, urging “ the propriety of at once instructing the District Attorney of San Joaquin County to dismiss the unwarranted proceeding against him,” as his arrest “ would be a burning disgrace to the State unless disavowed.” The Attorney General as promptly responded by advising the District Attorney that there was “ no evidence to implicate Justice Field in said shooting,” and that “ public justice demands that the charge against him be dismissed,” which was accordingly done.

act, before the nearest and most accessible magistrate in the county.

“Dated at Stockton this 14th day of August, A. D. 1889.

“H. V. J. SWAIN,

“*Justice of the Peace.*”

“The defendant, David Neagle, having been brought before me on this warrant, is committed for examination to the sheriff of San Joaquin County, California.

“Dated August 15, 1889.

H. V. J. SWAIN,

“*Justice of the Peace.*”

The petition then recited the circumstances of a rencontre between said Neagle and David S. Terry, in which the latter was instantly killed by two shots from a revolver in the hands of the former. The circumstances of this encounter and of what led to it will be considered with more particularity hereafter. The main allegation of this petition was that Neagle, as United States deputy marshal, acting under the orders of Marshal Franks, and in pursuance of instructions from the Attorney General of the United States, had, in consequence of an anticipated attempt at violence on the part of Terry against the Honorable Stephen J. Field, a justice of the Supreme Court of the United States, been in attendance upon said justice, and was sitting by his side at a breakfast table when a murderous assault was made by Terry on Judge Field, and in defence of the life of the judge the homicide was committed for which Neagle was held by Cunningham. The allegation was very distinct that Justice Field was engaged in the discharge of his duties as circuit justice of the United States for that circuit, having held court at Los Angeles, one of the places at which the court is by law held, and, having left that court, was on his way to San Francisco for the purpose of holding the Circuit Court at that place. The allegation was also very full that Neagle was directed by Marshal Franks

to accompany him for the purpose of protecting him, and that these orders of Franks were given in anticipation of the assault which actually occurred. It was also stated, in more general terms, that Marshal Neagle, in killing Terry under the circumstances, was in the discharge of his duty as an officer of the United States, and was not, therefore, guilty of a murder, and that his imprisonment under the warrant held by Sheriff Cunningham was in violation of the laws and Constitution of the United States, and that he was in custody for an act done in pursuance of the laws of the United States. This petition being sworn to by Farrish, and presented to Judge Sawyer, he made the following order:

“Let a writ of *habeas corpus* issue in pursuance of the prayer of the within petition, returnable before the United States Circuit Court for the Northern District of California.

“SAWYER, *Circuit Judge.*”

The writ was accordingly issued and delivered to Cunningham, who made the following return:

“COUNTY OF SAN JOAQUIN, *State of California.*

“SHERIFF’S OFFICE.

“To the honorable Circuit Court of the United States for the Northern District of California:

“I hereby certify and return that before the coming to me of the annexed writ of *habeas corpus* the said David Neagle was committed to my custody, and is detained by me by virtue of a warrant issued out of the justice’s court of Stockton township, State of California, county of San Joaquin, and by the endorsement made upon said warrant. Copy of said warrant and endorsement is annexed hereto and made a part of this return. Nevertheless, I have the body of the said David Neagle before the honorable court, as I am in the said writ commanded.

“August 17, 1889.

THOS. CUNNINGHAM,

“*Sheriff San Joaquin County, California.*”



Various pleadings and amended pleadings were made which do not tend much to the elucidation of the matter before us. Cunningham filed a demurrer to the petition for the writ of *habeas corpus* and Neagle filed a traverse to the return of the sheriff, which was accompanied by exhibits, the substance of which will be hereafter considered when the case comes to be examined upon its facts.

The hearing in the Circuit Court was had before Circuit Judge Sawyer and District Judge Sabin. The sheriff, Cunningham, was represented by G. A. Johnson, Attorney General of the State of California, and other counsel. A large body of testimony, documentary and otherwise, was submitted to the court, on which, after a full consideration of the subject, the court made the following order :

“ In the Matter of David Neagle, on *habeas corpus*.

“ In the above-entitled matter, the court having heard the testimony introduced on behalf of the petitioner, none having been offered for the respondent, and also the arguments of the counsel for petitioner and respondent, and it appearing to the court that the allegations of the petitioner in his amended answer or traverse to the return of the sheriff of San Joaquin County, respondent herein, are true, and that the prisoner is in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States, it is therefore ordered that petitioner be, and he is hereby, discharged from custody.”

From that order an appeal was allowed which brought the case to this court, accompanied by a voluminous record of all the matters which were before the court on the hearing.

The case was argued by Mr. Z. Montgomery and Mr. Johnson, Attorney General of California, for appellant,

Messrs. Shellabarger and Wilson filing a written argument on the same side. Hon. W. H. H. Miller, the Attorney General of the United States, and Mr. Joseph H. Choate and Mr. James C. Carter appeared for the appellee. The case was fully and exhaustively argued by these gentlemen.

Mr. JUSTICE MILLER, after stating the case as above, delivered the opinion of the court.

If it be true, as stated in the order of the court discharging the prisoner, that he was held "in custody for an act done in pursuance of a law of the United States, and in custody in violation of the Constitution and laws of the United States," there does not seem to be any doubt that, under the statute on that subject, he was properly discharged by the Circuit Court.

Section 753 of the Revised Statutes reads as follows :

"The writ of *habeas corpus* shall in no case extend to a prisoner in jail, unless where he is in custody under or by color of the authority of the United States ; or is committed for trial before some court thereof ; or is in custody for an act done or omitted in pursuance of a law of the United States, or of an order, process, or decree of a court or judge thereof ; or is in custody in violation of the Constitution or of a law or treaty of the United States ; or, being a subject or citizen of a foreign State, and domiciled therein, is in custody for an act done or omitted under any alleged right, title, authority, privilege, protection, or exemption claimed under the commission, or order, or sanction of any foreign State, or under color thereof, the validity and effect whereof depend upon the law of nations ; or unless it is necessary to bring the prisoner into court to testify."

And section 761 declares that when by the writ of *habeas corpus* the petitioner is brought up for a hearing the "court or justice or judge shall proceed in a summary way to determine the facts of the case, by hearing the testimony and

arguments, and thereupon to dispose of the party as law and justice require." This of course means that if he is held in custody in violation of the Constitution or a law of the United States, or for an act done or omitted in pursuance of a law of the United States, he must be discharged.

By the law, as it existed at the time of the enactment of the Revised Statutes, an appeal could be taken to the Circuit Court from any court of justice or judge inferior to the Circuit Court in a certain class of *habeas corpus* cases. But there was no appeal to the Supreme Court in any case except where the prisoner was the subject or citizen of a foreign State, and was committed or confined under the authority or law of the United States or of any State, on account of any act done or omitted to be done under the commission or authority of a foreign State, the validity of which depended upon the law of nations. But afterwards, by the act of Congress of March 3, 1885, 23 Stat. 437, this was extended by amendment as follows :

"That section seven hundred and sixty-four of the Revised Statutes be amended so that the same shall read as follows: 'From the final decision of such Circuit Court an appeal may be taken to the Supreme Court in the cases described in the preceding section.'"

The preceding section here referred to is section 763, and is the one on which the prisoner relies for his discharge from custody in this case.

It will be observed that in both the provisions of the Revised Statutes and of this latter act of Congress the mode of review, whether by the Circuit Court of the judgment of an inferior court or justice or judge, or by this court of the judgment of a Circuit Court, the word "appeal," and not "writ of error," is used, and as Congress has always used these words with a clear understanding of what is meant by them, namely, that by a writ of error only questions of law are brought up for review, as in actions at common law, while by an appeal, except when specially provided other-

wise, the entire case on both law and facts is to be reconsidered, there seems to be little doubt that, so far as it is essential to a proper decision of this case, the appeal requires us to examine into the evidence brought to sustain or defeat the right of the petitioner to his discharge.

The history of the incidents which led to the tragic event of the killing of Terry by the prisoner Neagle had its origin in a suit brought by William Sharon of Nevada, in the Circuit Court of the United States for the District of California, against Sarah Althea Hill, alleged to be a citizen of California, for the purpose of obtaining a decree adjudging a certain instrument in writing, possessed and exhibited by her, purporting to be a declaration of marriage between them, under the code of California, to be a forgery, and to have it set aside and annulled. This suit, which was commenced October 3, 1883, was finally heard before Judge Sawyer, the Circuit Judge for that circuit, and Judge Deady, United States District Judge for Oregon, who had been duly appointed to assist in holding the Circuit Court for the District of California. The hearing was on September 29, 1885, and on the 15th of January, 1886, a decree was rendered granting the prayer of the bill. In that decree it was declared that the instrument purporting to be a declaration of marriage, set out and described in the bill of complaint, "was not signed or executed at any time by William Sharon, the complainant; that it is not genuine; that it is false, counterfeited, fabricated, forged, and fraudulent, and, as such, is utterly null and void. And it is further ordered and decreed that the respondent, Sarah Althea Hill, deliver up and deposit with the clerk of the court said instrument, to be endorsed 'cancelled,' and that the clerk write across it 'cancelled' and sign his name and affix his seal thereto."

The rendition of this decree was accompanied by two opinions, the principal one being written by Judge Deady and a concurring one by Judge Sawyer. They were very



full in their statement of the fraud and forgery practised by Miss Hill, and stated that it was also accompanied by perjury. And inasmuch as Mr. Sharon had died between the hearing of the argument of the case on the 29th of September, 1885, and the time of rendering this decision, January 15, 1886, an order was made setting forth that fact, and declaring that the decree was entered as of the date of the hearing, *nunc pro tunc*.

Nothing was done under this decree. The defendant, Sarah Althea Hill, did not deliver up the instrument to the clerk to be cancelled, but she continued to insist upon its use in the State court. Under these circumstances, Frederick W. Sharon, as the executor of the will of his father, William Sharon, filed in the Circuit Court for the Northern District of California, on March 12, 1888, a bill of revivor, stating the circumstances of the decree, the death of his father, and that the decree had not been performed; alleging also the intermarriage of Miss Hill with David S. Terry, of the city of Stockton, in California, and making the said Terry and wife parties to this bill of revivor. The defendants both demurred and answered, resisting the prayer of the plaintiff, and denying that the petitioner was entitled to any relief.

This case was argued in the Circuit Court before Field, Circuit Justice; Sawyer, Circuit Judge, and Sabin, District Judge. While the matter was held under advisement, Judge Sawyer, on returning from Los Angeles, in the Southern District of California, where he had been holding court, found himself on the train as it left Fresno, which is understood to have been the residence of Terry and wife, in a car in which he noticed that Mr. and Mrs. Terry were in a section behind him, on the same side. On this trip from Fresno to San Francisco, Mrs. Terry grossly insulted Judge Sawyer, and had her husband change seats so as to sit directly in front of the Judge, while she passed him with insolent remarks, and pulled his hair with a vicious jerk, and then,

in an excited manner, taking her seat by her husband's side, said: "I will give him a taste of what he will get by and by. Let him render this decision if he dares,"—the decision being the one already mentioned, then under advisement. Terry then made some remark about too many witnesses being in the car, adding that "The best thing to do with him would be to take him out into the bay and drown him." These incidents were witnessed by two gentlemen who knew all the parties, and whose testimony is found in the record before us.

This was August 14, 1888. On the 3d of September the court rendered its decision granting the prayer of the bill of revivor in the name of Frederick W. Sharon and against Sarah Althea Terry and her husband, David S. Terry. The opinion was delivered by Mr. Justice Field, and during its delivery a scene of great violence occurred in the courtroom. It appears that shortly before the court opened on that day both the defendants in the case came into the courtroom, and took seats within the bar at the table next the clerk's desk, and almost immediately in front of the judges. Besides Mr. Justice Field, there were present on the bench Judge Sawyer and Judge Sabin of the District Court of the United States for the District of Nevada. The defendants had denied the jurisdiction of the court originally to render the decree sought to be revived, and the opinion of the court necessarily discussed this question without reaching the merits of the controversy. When allusion was made to this question Mrs. Terry rose from her seat, and, addressing the justice who was delivering the opinion, asked in an excited manner whether he was going to order her to give up the marriage contract to be cancelled. Mr. Justice Field said: "Be seated, madam." She repeated the question, and was again told to be seated. She then said, in a very excited and violent manner, that Justice Field had been bought, and wanted to know the price he had sold himself for; that he had got Newland's money for it, and

everybody knew that he had got it, or words to that effect. Mr. Justice Field then directed the marshal to remove her from the court room. She asserted that she would not go from the room, and that no one could take her from it.

Marshal Franks proceeded to carry out the order of the court by attempting to compel her to leave, when Terry, her husband, rose from his seat under great excitement, exclaiming that no man living should touch his wife, and struck the marshal a blow in his face so violent as to knock out a tooth. He then unbuttoned his coat, thrust his hand under his vest, apparently for the purpose of drawing a bowie-knife, when he was seized by persons present and forced down on his back. In the meantime Mrs. Terry was removed from the court-room by the marshal, and Terry was allowed to rise and was accompanied by officers to the door leading to the marshal's office. As he was about leaving the room, or immediately after being out of it, he succeeded in drawing a bowie-knife, when his arms were seized by a deputy marshal and others present to prevent him from using it, and they were able to wrench it from him only after a severe struggle. The most prominent person engaged in wresting the knife from Terry was Neagle, the prisoner now in court.

For this conduct both Terry and his wife were sentenced by the court to imprisonment for contempt, Mrs. Terry for one month and Terry for six months, and these sentences were immediately carried into effect. Both the judgment of the court on the petition for the revival of the decree in the case of Sharon against Hill and the judgment of the Circuit Court imprisoning Terry and wife for contempt have been brought to this court for review, and in both cases the judgments have been affirmed. The report of the cases may be found in *Ex parte Terry*, 128 U. S. 289, and *Terry v. Sharon*, 131 U. S. 40.

Terry and Mrs. Terry were separately indicted by the grand jury of the Circuit Court of the United States during

the same term for their part in these transactions, and the cases were pending in said court at the time of Terry's death. It also appears that Mrs. Terry, during her part of this altercation in the court-room, was making efforts to open a small satchel which she had with her, but through her excitement she failed. This satchel, which was taken from her, was found to have in it a revolving pistol.

From that time until his death the denunciations by Terry and his wife of Mr. Justice Field were open, frequent, and of the most vindictive and malevolent character. While being transported from San Francisco to Alameda, where they were imprisoned, Mrs. Terry repeated a number of times that she would kill both Judge Field and Judge Sawyer. Terry, who was present, said nothing to restrain her, but added that *he* was not through with Judge Field yet; and, while in jail at Alameda, Terry said that after he got out of jail he would horsewhip Judge Field; and that he did not believe he would ever return to California, but this earth was not large enough to keep him from finding Judge Field and horsewhipping him; and, in reply to a remark that this would be a dangerous thing to do, and that Judge Field would resent it, he said: "If Judge Field resents it I will kill him." And while in jail Mrs. Terry exhibited to a witness Terry's knife, at which he laughed and said: "Yes, I always carry that," and made a remark about judges and marshals, that "they were all a lot of cowardly curs," and he would "see some of them in their graves yet." Mrs. Terry also said that she expected to kill Judge Field some day.

Perhaps the clearest expression of Terry's feelings and intentions in the matter was in a conversation with Mr. Thomas T. Williams, editor of one of the daily newspapers of California. This interview was brought about by a message from Terry requesting Williams to call and see him. In speaking of the occurrences in the court, he said that Justice Field had put a lie in the record about him, and when



he met Field he would have to take that back, "and if he did not take it back and apologize for having lied about him, he would slap his face or pull his nose." "I said to him," said the witness, "'Judge Terry, would not that be a dangerous thing to do? Justice Field is not a man who would permit any one to put a deadly insult upon him like that.' He said, 'Oh, Field won't fight.' I said, 'Well, Judge, I have found nearly all men will fight; nearly every man will fight when there is occasion for it, and Judge Field has had a character in this State of having the courage of his convictions, and being a brave man.' At the conclusion of that branch of the conversation, I said to him, 'Well, Judge Field is not your physical equal, and if any trouble should occur he would be very likely to use a weapon.' He said, 'Well, that's as good a thing as I want to get.' The whole impression conveyed to me by this conversation was, that he felt he had some cause of grievance against Judge Field; that he hoped they might meet, that he might have an opportunity to force a quarrel upon him, and he would get him into a fight." Mr. Williams says that after the return of Justice Field to California, in the spring or summer of 1889, he had other conversations with Terry, in which the same vindictive feelings of hatred were manifested and expressed by him.

It is useless to go over the testimony on this subject more particularly. It is sufficient to say that the evidence is abundant that both Terry and wife contemplated some attack upon Judge Field during his official visit to California in the summer of 1889, which they intended should result in his death. Many of these matters were published in the newspapers, and the press of California was filled with the conjectures of a probable attack by Terry on Justice Field as soon as it became known that he was going to attend the Circuit Court in that year.

So much impressed were the friends of Judge Field, and of public justice, both in California and in Washington,

with the fear that he would fall a sacrifice to the resentment of Terry and his wife, that application was made to the Attorney General of the United States suggesting the propriety of his furnishing some protection to the judge while in California. This resulted in a correspondence between the Attorney General of the United States, the District Attorney, and the marshal of the Northern District of California on that subject. This correspondence is here set out:

“DEPARTMENT OF JUSTICE,

“WASHINGTON, *April 27, 1889.*

“JOHN C. FRANKS,

“United States Marshal, San Francisco, Cal.

“SIR: The proceedings which have heretofore been had in connection with the case of Mr. and Mrs. Terry in your United States Circuit Court have become matter of public notoriety, and I deem it my duty to call your attention to the propriety of exercising unusual caution, in case further proceedings shall be had in that case, for the protection of his Honor Justice Field or whoever may be called upon to hear and determine the matter. Of course I do not know what may be the feelings or purpose of Mr. and Mrs. Terry in the premises, but many things which have happened indicate that violence on their part is not impossible. It is due to the dignity and independence of the court and the character of its judge that no effort on the part of the government shall be spared to make them feel entirely safe and free from anxiety in the discharge of their high duties.

“You will understand, of course, that this letter is not for the public, but to put you upon your guard. It will be proper for you to show it to the district attorney, if deemed best.

“Yours truly,

W. H. H. MILLER,

“*Attorney General.*”

“ UNITED STATES MARSHAL’S OFFICE,  
“ NORTHERN DISTRICT OF CALIFORNIA,  
“ SAN FRANCISCO, *May 6, 1889.*

“ HON. W. H. H. MILLER,

“ Attorney General, Washington, D. C.

“ SIR: Yours of the 27th ultimo at hand.

“ When the Hon. Judge Lorenzo Sawyer, our Circuit Judge, returned from Los Angeles (some time before the celebrated court scene) and informed me of the disgraceful action of Mrs. Terry towards him on the cars, while her husband sat in front smilingly approving it, I resolved to watch the Terrys (and so notified my deputies) whenever they should enter the court-room, and be ready to suppress the very first indignity offered by either of them to the judges. After this, at the time of their ejection from the court-room, when I held Judge Terry and his wife as prisoners in my private office and heard his threats against Justice Field, I was more fully determined than ever to throw around the Justice and Judge Sawyer every safeguard I could.

“ I have given the matter careful consideration, with the determination to fully protect the federal judges at this time, trusting that the department will reimburse me for any reasonable expenditure.

“ I have always, whenever there is any likelihood of either Judge or Mrs. Terry appearing in court, had a force of deputies with myself on hand to watch their every action. You can rest assured that when Justice Field arrives he, as well as all the federal judges, will be protected from insults, and where an order is made it will be executed without fear as to consequences. I shall follow your instructions and act with more than usual caution. I have already consulted with the United States Attorney, J. T. Carey, Esq., as to the advisability of making application to you, at the time the Terrys are tried upon criminal charges, for me to select two or more detectives to assist in the case, and

also assist me in protecting Justice Field while in my district. I wish the judges to feel secure, and for this purpose will see to it that their every wish is promptly obeyed. I notice your remarks in regard to the publicity of your letter, and will obey your request. I shall only be too happy to receive any suggestions from you at any time.

"The opinion among the better class of citizens here is very bitter against the Terrys, though, of course, they have their friends, and, unfortunately, among that class it is necessary to watch.

"Your most obedient servant, J. C. FRANKS,  
*" U. S. Marshal Northern District of California."*

"SAN FRANCISCO, CAL., May 7, 1889.

"Hon. W. H. H. MILLER,

"U. S. Attorney General, Washington, D. C.

"DEAR SIR: Marshal Franks exhibited to me your letter bearing date the 27th ult., addressed to him upon the subject of using due caution by way of protecting Justice Field and the federal judges here in the discharge of their duties in matters in which the Terrys are interested. I noted your suggestion with a great degree of pleasure, not because our marshal is at all disposed to leave anything undone within his authority or power to do, but because it encouraged him to know and feel that the Head of our Department was in full sympathy with the efforts being made to protect the judges and vindicate the dignity of our courts.

"I write merely to suggest that there is just reason, in the light of the past and the threats made by Judge and Mrs. Terry against Justice Field and Judge Sawyer, to apprehend personal violence at any moment and at any place, as well in court as out of court, and that while due caution has always been taken by the marshal when either Judge or Mrs. Terry is about the building in which the courts are held, he has not felt it within his authority to guard either Judge Sawyer or Justice Field against harm when away from the appraisers' building.



“Discretion dictates, however, that a protection should be thrown about them at other times and places, when proceedings are being had before them in which the Terrys are interested, and I verily believe, in view of the direful threats made against Justice Field, that he will be in great danger at all times while here.

“Mr. Franks is a prudent, cool, and courageous officer, who will not abuse any authority granted him. I would therefore suggest that he be authorized in his discretion to retain one or more deputies, at such times as he may deem necessary, for the purposes suggested. That publicity may not be given to the matter, it is important that the deputies whom he may select be not known as such, and that efficient service may be assured for the purposes indicated, it seems to me that they should be strangers to the Terrys.

“The Terrys are unable to appreciate that an officer should perform his official duty when that duty in any way requires his efforts to be directed against them. The marshal, his deputies, and myself suffer daily indignities and insults from Mrs. Terry, in court and out of court, committed in the presence of her husband and without interference upon his part. I do not purpose being deterred from any duty, nor do I purpose being intimidated in the least degree from doing my whole duty in the premises, but I shall feel doubly assured in being able to do so knowing that our marshal has your kind wishes and encouragement in doing everything needed to protect the officers of the court in the discharge of their duties.

“This, of course, is not intended for the public files of your office, nor will it be on file in my office. Prudence dictates great caution on the part of the officials who may be called upon to have anything to do in the premises, and I deem it to be of the greatest importance that the suggestions back and forth be confidential.

"I shall write you further upon the subject of these cases in a few days.

"I have the honor to be your most obedient servant,

"JOHN T. CAREY,

"*U. S. Attorney.*"

"DEPARTMENT OF JUSTICE,

"WASHINGTON, D. C., *May 27, 1889.*

"J. C. FRANKS, Esq.,

"United States Marshal, San Francisco, Cal.

"SIR: Referring to former correspondence of the department relating to a possible disorder in the session of the approaching term of court, owing to the small number of bailiffs under your control to preserve order, you are directed to employ certain special deputies at a *per diem* of five dollars, payable out of the appropriation for fees and expenses of marshals, to be submitted to the court as a separate account from your other accounts against the Government for approval, under section 846, Revised Statutes, as an extraordinary expense, that the same may be forwarded to this Department in order to secure executive action and approval.

"Very respectfully,

W. H. H. MILLER,

"*Attorney General.*"

The result of this correspondence was that Marshal Franks appointed Mr. Neagle a deputy marshal for the Northern District of California, and gave him special instructions to attend upon Judge Field both in court and while going from one court to another, and protect him from any assault that might be attempted upon him by Terry and wife. Accordingly, when Judge Field went from San Francisco to Los Angeles to hold the Circuit Court of the United States at that place, Mr. Neagle accompanied him, remained with him for the few days that he was engaged in the business of that court, and returned with him to San Francisco.

It appears from the uncontradicted evidence in the case that while the sleeping-car, in which were Justice Field and Mr. Neagle, stopped a moment in the early morning at Fresno, Terry and wife got on the train. The fact that they were on the train became known to Neagle, and he held a conversation with the conductor as to what peace officers could be found at Lathrop, where the train stopped for breakfast, and the conductor was requested to telegraph to the proper officers of that place to have a constable or some peace officer on the ground when the train should arrive, anticipating that there might be violence attempted by Terry upon Judge Field. It is sufficient to say that this resulted in no available aid to assist in keeping the peace. When the train arrived Neagle informed Judge Field of the presence of Terry on the train, and advised him to remain and take his breakfast in the car. This the Judge refused to do, and he and Neagle got out of the car and went into the dining-room and took seats beside each other in the place assigned them by the person in charge of the breakfast-room, and very shortly after this Terry and wife came into the room; and Mrs. Terry, recognizing Judge Field, turned and left in great haste, while Terry passed beyond where Judge Field and Neagle were and took his seat at another table. It was afterwards ascertained that Mrs. Terry went to the car and took from it a satchel in which was a revolver. Before she returned to the eating-room, Terry arose from his seat, and passing around the table in such a way as brought him behind Judge Field, who did not see him or notice him, came up where he was sitting with his feet under the table, and struck him a blow on the side of his face, which was repeated on the other side. He also had his arm drawn back and his fist doubled up, apparently to strike a third blow, when Neagle, who had been observing him all this time, arose from his seat with his revolver in his hand, and in a very loud voice shouted out: "Stop! stop! I am an officer!" Upon this Terry

turned his attention to Neagle, and, as Neagle testifies, seemed to recognize him, and immediately turned his hand to thrust it in his bosom, as Neagle felt sure, with the purpose of drawing a bowie-knife. At this instant Neagle fired two shots from his revolver into the body of Terry, who immediately sank down and died in a few minutes.

Mrs. Terry entered the room with the satchel in her hand just after Terry sank to the floor. She rushed up to the place where he was, threw herself upon his body, made loud exclamations and moans, and commenced inviting the spectators to avenge her wrong upon Field and Neagle. She appeared to be carried away by passion, and in a very earnest manner charged that Field and Neagle had murdered her husband intentionally, and shortly afterwards she appealed to the persons present to examine the body of Terry to see that he had no weapons. This she did once or twice. The satchel which she had, being taken from her, was found to contain a revolver.

These are the material circumstances produced in evidence before the Circuit Court on the hearing of this *habeas corpus* case. It is but a short sketch of a history which is given in over five hundred pages in the record, but we think it is sufficient to enable us to apply the law of the case to the question before us. Without a more minute discussion of this testimony, it produces upon us the conviction of a settled purpose on the part of Terry and his wife, amounting to a conspiracy, to murder Justice Field. And we are quite sure that if Neagle had been merely a brother or a friend of Judge Field, travelling with him, and aware of all the previous relations of Terry to the Judge—as he was—of his bitter animosity, his declared purpose to have revenge even to the point of killing him, he would have been justified in what he did in defence of Mr. Justice Field's life, and possibly of his own.

But such a justification would be a proper subject for consideration on a trial of the case for murder in the courts



of the State of California, and there exists no authority in the courts of the United States to discharge the prisoner while held in custody by the State authorities for this offence, unless there be found in aid of the defence of the prisoner some element of power and authority asserted under the Government of the United States.

This element is said to be found in the facts that Mr. Justice Field, when attacked, was in the immediate discharge of his duty as judge of the Circuit Courts of the United States within California; that the assault upon him grew out of the animosity of Terry and wife, arising out of the previous discharge of his duty as circuit justice in the case for which they were committed for contempt of court; and that the deputy marshal of the United States, who killed Terry in defence of Field's life, was charged with a duty under the law of the United States to protect Field from the violence which Terry was inflicting, and which was intended to lead to Field's death.

To the inquiry whether this proposition is sustained by law and the facts which we have recited, we now address ourselves.

Mr. Justice Field was a member of the Supreme Court of the United States, and had been a member of that court for over a quarter of a century, during which he had become venerable for his age and for his long and valuable service in that court. The business of the Supreme Court has become so exacting that for many years past the justices of it have been compelled to remain for the larger part of the year in Washington City, from whatever part of the country they may have been appointed. The term for each year, including the necessary travel and preparations to attend at its beginning, has generally lasted from eight to nine months.

But the justices of this court have imposed upon them other duties, the most important of which arise out of the fact that they are also judges of the Circuit Courts of the

United States. Of these circuits there are nine, to each one of which a justice of the Supreme Court is allotted, under section 606 of the Revised Statutes, the provision of which is as follows:

“The chief justice and associate justices of the Supreme Court shall be allotted among the circuits by an order of the court, and a new allotment shall be made whenever it becomes necessary or convenient by reason of the alteration of any circuit, or of the new appointment of a chief justice or associate justice, or otherwise.”

Section 610 declares that it “shall be the duty of the chief justice, and of each justice of the Supreme Court, to attend at least one term of the Circuit Court, in each district of the circuit to which he is allotted during every period of two years.”

Although this enactment does not require in terms that the justices shall go to their circuits more than once in two years, the effect of it is to compel most of them to do this, because there are so many districts in many of the circuits that it is impossible for the circuit justice to reach them all in one year, and the result of this is that he goes to some of them in one year and to others in the next year, thus requiring an attendance in the circuit every year.

The justices of the Supreme Court have been members of the Circuit Courts of the United States ever since the organization of the Government, and their attendance on the circuit and appearance at the places where the courts are held has always been thought to be a matter of importance. In order to enable him to perform this duty, Mr. Justice Field had to travel each year from Washington City, near the Atlantic coast, to San Francisco, on the Pacific coast. In doing this he was as much in the discharge of a duty imposed upon him by law as he was while sitting in court and trying causes. There are many duties which the judge performs outside of the court-room where he sits to pronounce judgment or to preside over a trial. The statutes of the United

States, and the established practice of the courts, require that the judge perform a very large share of his judicial labors at what is called "chambers." This chamber work is as important as necessary, as much a discharge of his official duty as that performed in the court-house. Important cases are often argued before the judge at any place convenient to the parties concerned, and a decision of the judge is arrived at by investigations made in his own room, wherever he may be, and it is idle to say that this is not as much the performance of judicial duty as the filing of the judgment with the clerk, and the announcement of the result in open court.

So it is impossible for a justice of the Supreme Court of the United States, who is compelled by the obligations of duty to be so much in Washington City, to discharge his duties of attendance on the Circuit Courts as prescribed by section 610, without travelling in the usual and most convenient modes of doing it to the place where the court is to be held. This duty is as much an obligation imposed by the law as if it had said in words "the justices of the Supreme Court shall go from Washington City to the place where their terms are held every year."

Justice Field had not only left Washington and travelled the three thousand miles or more which were necessary to reach his circuit, but he had entered upon the duties of that circuit, had held the court at San Francisco for some time; and, taking a short leave of that court, had gone down to Los Angeles, another place where a court was to be held, and sat as a judge there for several days, hearing cases and rendering decisions. It was in the necessary act of returning from Los Angeles to San Francisco, by the usual mode of travel between the two places, where his court was still in session, and where he was required to be, that he was assaulted by Terry in the manner which we have already described.

The occurrence which we are called upon to consider was

of so extraordinary a character that it is not to be expected that many cases can be found to cite as authority upon the subject.

In the case of *United States v. The Schooner Little Charles*, 1 Brock. 380, 382, a question arose before Chief Justice Marshall, holding the Circuit Court of the United States for Virginia, as to the validity of an order made by the District Judge at his chambers, and not in court. The act of Congress authorized stated terms of the District Court, and gave the judge power to hold special courts at his discretion, either at the place appointed by the law or such other place in the district as the nature of the business and his discretion should direct. He says: "It does not seem to be a violent construction of such an act to consider the judge as constituting a court whenever he proceeds on judicial business;" and cites the practice of the courts in support of that view of the subject.

In the case of *United States v. Gleason*, 1 Wool. C. C. 128, 132, the prisoner was indicted for the murder of two enrolling officers who were charged with the duty of arresting deserters, or those who had been drafted into the service and had failed to attend. These men, it was said, had visited the region of country where they were murdered, and, having failed of accomplishing their purpose of arresting the deserters, were on their return to their home when they were killed, and the court was asked to instruct the jury that under these circumstances they were not engaged in the duty of arresting the deserters named. "It is claimed by the counsel for the defendant," says the report, "that if the parties killed had been so engaged, and had come to that neighborhood with the purpose of arresting the supposed deserters, but at the moment of the assault had abandoned the purpose of making the arrests at that time, and were returning to headquarters at Grinnell, with a view to making other arrangements for arrest at another time, they were not so engaged as to bring the case within the law." But



the court held that this was not a sound construction of the statute, and "that if the parties killed had come into that neighborhood with intent to arrest the deserters named, and had been employed by the proper officer for that service, and were, in the proper prosecution of that purpose, returning to Grinnell with a view to making other arrangements to discharge this duty, they were still engaged in arresting the deserters, within the meaning of the statute. It is not necessary," said the court, "that the party killed should be engaged in the immediate act of arrest, but it is sufficient if he be employed in and about that business when assaulted. The purpose of the law is to protect the life of the person so employed, and this protection continues so long as he is engaged in a service necessary and proper to that employment."

We have no doubt that Mr. Justice Field when attacked by Terry was engaged in the discharge of his duties as Circuit Justice of the Ninth Circuit, and was entitled to all the protection under those circumstances which the law could give him.

It is urged, however, that there exists no statute authorizing any such protection as that which Neagle was instructed to give Judge Field in the present case, and indeed no protection whatever against a vindictive or malicious assault growing out of the faithful discharge of his official duties; and that the language of section 753 of the Revised Statutes, that the party seeking the benefit of the writ of *habeas corpus* must in this connection show that he is "in custody for an act done or omitted in pursuance of a law of the United States," makes it necessary that upon this occasion it should be shown that the act for which Neagle is imprisoned was done by virtue of an act of Congress. It is not supposed that any special act of Congress exists which authorizes the marshals or deputy marshals of the United States in express terms to accompany the judges of the Supreme Court through their circuits and act as a body-guard to them, to

defend them against malicious assaults against their persons. But we are of opinion that this view of the statute is an unwarranted restriction of the meaning of a law designed to extend in a liberal manner the benefit of the writ of *habeas corpus* to persons imprisoned for the performance of their duty. And we are satisfied that if it was the duty of Neagle, under the circumstances, a duty which could only arise under the laws of the United States, to defend Mr. Justice Field from a murderous attack upon him, he brings himself within the meaning of the section we have recited. This view of the subject is confirmed by the alternative provision, that he must be in custody "for an act done or omitted in pursuance of a law of the United States or of an order, process, or decree of a court of judge thereof, or is in custody in violation of the Constitution or of a law or treaty of the United States."

In the view we take of the Constitution of the United States, any obligation fairly and properly inferrible from that instrument, or any duty of the marshal to be derived from the general scope of his duties under the laws of the United States, is "a law" within the meaning of this phrase. It would be a great reproach to the system of government of the United States, declared to be within its sphere sovereign and supreme, if there is to be found within the domain of its powers no means of protecting the judges, in the conscientious and faithful discharge of their duties, from the malice and hatred of those upon whom their judgments may operate unfavorably.

It has in modern times become apparant that the physical health of the community is more efficiently promoted by hygienic and preventive means than by the skill which is applied to the cure of disease after it has become fully developed. So also the law, which is intended to prevent crime, in its general spread among the community, by regulations, police organization, and otherwise, which are adapted for the protection of the lives and property of citizens, for

the dispersion of mobs, for the arrest of thieves and assassins, for the watch which is kept over the community, as well as over this class of people, is more efficient than punishment of crimes after they have been committed.

If a person in the situation of Judge Field could have no other guarantee of his personal safety, while engaged in the conscientious discharge of a disagreeable duty, than the fact that if he was murdered his murderer would be subject to the laws of a State and by those laws could be punished, the security would be very insufficient. The plan which Terry and wife had in mind of insulting him and assaulting him and drawing him into a defensive physical contest, in the course of which they would slay him, shows the little value of such remedies. We do not believe that the government of the United States is thus inefficient, or that its Constitution and laws have left the high officers of the government so defenceless and unprotected.

The views expressed by this court through Mr. Justice Bradley, in *Ex parte Siebold*, 100 U. S. 371, 394, are very pertinent to this subject, and express our views with great force. That was a case of a writ of *habeas corpus*, where Siebold had been indicted in the Circuit Court of the United States for the District of Maryland for an offence committed against the election laws, during an election at which members of Congress and officers of the State of Maryland were elected. He was convicted and sentenced to fine and imprisonment, and filed his petition in this court for a writ of *habeas corpus*, to be relieved on the ground that the court which had convicted him was without jurisdiction. The foundation of this allegation was that the Congress of the United States had no right to prescribe laws for the conduct of the election in question, or for enforcing the laws of the State of Maryland by the courts of the United States. In the course of the discussion of the relative powers of the federal and state courts on this subject, it is said:

“Somewhat akin to the argument which has been considered is the objection that the deputy marshals authorized by the act of Congress to be created and to attend the elections are authorized to keep the peace; and that this is a duty which belongs to the state authorities alone. It is argued that the preservation of peace and good order in society is not within the powers confided to the government of the United States, but belongs exclusively to the States. Here again we are met with the theory that the government of the United States does not rest upon the soil and territory of the country. We think that this theory is founded on an entire misconception of the nature and powers of that government. We hold it to be an incontrovertible principle that the government of the United States may, by means of physical force, exercised through its official agents, execute on every foot of American soil the powers and functions that belong to it. This necessarily involves the power to command obedience to its laws, and hence the power to keep the peace to that extent. This power to enforce its laws and to execute its functions in all places does not derogate from the power of the State to execute its laws at the same time and in the same places. The one does not exclude the other, except where both cannot be executed at the same time. In that case the words of the Constitution itself show which is to yield. ‘This Constitution, and all laws which shall be made in pursuance thereof, . . . shall be the supreme law of the land.’ . . . Without the concurrent sovereignty referred to, the national government would be nothing but an advisory government. Its executive power would be absolutely nullified. Why do we have marshals at all, if they cannot physically lay their hands on persons and things in the performance of their proper duties? What functions can they perform, if they cannot use force? In executing the processes of the courts, must they call on the nearest constable for protection? must they rely on him to use the requisite



compulsion, and to keep the peace, whilst they are soliciting and entreating the parties and bystanders to allow the law to take its course? This is the necessary consequence of the positions that are assumed. If we indulge in such impracticable views as these, and keep on refining and rerefining, we shall drive the national government out of the United States, and relegate it to the District of Columbia, or perhaps to some foreign soil. We shall bring it back to a condition of greater helplessness than that of the old confederation. . . . It must execute its powers or it is no government. It must execute them on the land as well as on the sea, on things as well as on persons. And, to do this, it must necessarily have power to command obedience, preserve order, and keep the peace; and no person or power in this land has the right to resist or question its authority, so long as it keeps within the bounds of its jurisdiction."

At the same term of the court, in the case of *Tennessee v. Davis*, 100 U. S. 257, 262, where the same questions in regard to the relative powers of the federal and state courts were concerned, in regard to criminal offences, the court expressed its views through Mr. Justice Strong, quoting from the case of *Martin v. Hunter*, 1 Wheat. 363, the following language: "The general government must cease to exist whenever it loses the power of protecting itself in the exercise of its constitutional powers;" and then proceeding: "It can act only through its officers and agents, and they must act within the States. If, when thus acting, and within the scope of their authority, those officers can be arrested and brought to trial in a state court, for an alleged offence against the law of the State, yet warranted by the federal authority they possess, and if the general government is powerless to interfere at once for their protection—if their protection must be left to the action of the state court—the operations of the general government may at any time be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix

penalties to acts done under the immediate direction of the national government, and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally federal law, in such a manner as to paralyze the operations of the Government. And even if, after trial and final judgment in the State court, the case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends it is supreme. No state government can exclude it from the exercise of any authority conferred upon it by the Constitution; obstruct its authorized officers against its will; or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it."

To cite all the cases in which this principle of the supremacy of the government of the United States, in the exercise of all the powers conferred upon it by the Constitution, is maintained, would be an endless task. We have selected these as being the most forcible expressions of the views of the court, having a direct reference to the nature of the case before us.

Where, then, are we to look for the protection which we have shown Judge Field was entitled to when engaged in the discharge of his official duties? Not to the courts of the United States, because, as has been more than once said in this court, in the division of the powers of government between the three great departments, executive, legislative, and judicial, the judicial is the weakest for the purposes of self-protection and for the enforcement of the powers which

it exercises. The ministerial officers through whom its commands must be executed are marshals of the United States, and belong emphatically to the executive department of the government. They are appointed by the President, with the advice and consent of the Senate. They are removable from office at his pleasure. They are subjected by act of Congress to the supervision and control of the Department of Justice, in the hands of one of the cabinet officers of the President, and their compensation is provided by acts of Congress. The same may be said of the district attorneys of the United States, who prosecute and defend the claims of the government in the courts.

The legislative branch of the government can only protect the judicial officers by the enactment of laws for that purpose, and the argument we are now combating assumes that no such law has been passed by Congress.

If we turn to the executive department of the government we find a very different condition of affairs. The Constitution, section 3, Article 2, declares that the President "shall take care that the laws be faithfully executed," and he is provided with the means of fulfilling this obligation by his authority to commission all the officers of the United States, and, by and with the advice and consent of the Senate, to appoint the most important of them and to fill vacancies. He is declared to be commander-in-chief of the army and navy of the United States. The duties which are thus imposed upon him he is further enabled to perform by the recognition in the Constitution, and the creation by acts of Congress, of executive departments, which have varied in number from four or five to seven or eight, the heads of which are familiarly called cabinet ministers. These aid him in the performance of the great duties of his office, and represent him in a thousand acts to which it can hardly be supposed his personal attention is called, and thus he is enabled to fulfil the duty of his great department, expressed in the phrase that "he shall take care that the laws be faithfully executed."

Is this duty limited to the enforcement of acts of Congress or of treaties of the United States according to their *express terms*, or does it include the rights, duties, and obligations growing out of the Constitution itself, our international relations, and all the protection implied by the nature of the government under the Constitution?

One of the most remarkable episodes in the history of our foreign relations, and which has become an attractive historical incident, is the case of Martin Koszta, a native of Hungary, who, though not fully a naturalized citizen of the United States, had in due form of law made his declaration of intention to become a citizen. While in Smyrna he was seized by command of the Austrian consul general at that place, and carried on board the Hussar, an Austrian vessel, where he was held in close confinement. Captain Ingraham, in command of the American sloop of war St. Louis, arriving in port at that critical period, and ascertaining that Koszta had with him his naturalization papers, demanded his surrender to him, and was compelled to train his guns upon the Austrian vessel before his demands were complied with. It was, however, to prevent bloodshed, agreed that Koszta should be placed in the hands of the French consul subject to the result of diplomatic negotiations between Austria and the United States. The celebrated correspondence between Mr. Marcy, Secretary of State, and Chevalier Hülsemann, the Austrian minister at Washington, which arose out of this affair and resulted in the release and restoration to liberty of Koszta, attracted a great deal of public attention, and the position assumed by Mr. Marcy met the approval of the country and of Congress, who voted a gold medal to Captain Ingraham for his conduct in the affair. Upon what act of Congress then existing can any one lay his finger in support of the action of our government in this matter?

So, if the President or the Postmaster General is advised that the mails of the United States, possibly carrying treas-



ure, are liable to be robbed and the mail-carriers assaulted and murdered in any particular region of country, who can doubt the authority of the President or of one of the executive departments under him to make an order for the protection of the mail and of the persons and lives of its carriers, by doing exactly what was done in the case of Mr. Justice Field, namely, providing a sufficient guard, whether it be by soldiers of the army or by marshals of the United States, with a *posse comitatus* properly armed and equipped, to secure the safe performance of the duty of carrying the mail wherever it may be intended to go?

The United States is the owner of millions of acres of valuable public land, and has been the owner of much more which it has sold. Some of these lands owe a large part of their value to the forests which grow upon them. These forests are liable to depredations by people living in the neighborhood, known as timber thieves, who make a living by cutting and selling such timber, and who are trespassers. But until quite recently, even if there be one now, there was no statute authorizing any preventive measures for the protection of this valuable public property. Has the President no authority to place guards upon the public territory to protect its timber? No authority to seize the timber when cut and found upon the ground? Has he no power to take any measures to protect this vast domain? Fortunately we find this question answered by this court in the case of *Wells v. Nickles*, 104 U. S. 444. That was a case in which a class of men appointed by local land officers, under instructions from the Secretary of the Interior, having found a large quantity of this timber cut down from the forests of the United States and lying where it was cut, seized it. The question of the title to this property coming in controversy between Wells and Nickles, it became essential to inquire into the authority of these timber agents of the government thus to seize the timber cut by trespassers on its lands. The court said: "The effort we have made

to ascertain and fix the authority of these timber agents by any positive position of law has been unsuccessful." But the court, notwithstanding there was no special statute for it, held that the Department of the Interior, acting under the idea of protecting from depredation timber on the lands of the government, had gradually come to assert the right to seize what is cut and taken away from them wherever it can be traced, and in aid of this the registers and receivers of the Land Office had, by instructions from the Secretary of the Interior, been constituted agents of the United States for these purposes, with power to appoint special agents under themselves. And the court upheld the authority of the Secretary of the Interior to make these rules and regulations for the protection of the public lands.

One of the cases in this court in which this question was presented in the most imposing form is that of *United States v. San Jacinto Tin Company*, 125 U. S. 273, 279, 280. In that case a suit was brought in the name of the United States, by order of the Attorney General, to set aside a patent which had been issued for a large body of valuable land, on the ground that it was obtained from the government by fraud and deceit practised upon its officers. A preliminary question was raised by counsel for defendant, which was earnestly insisted upon, as to the right of the Attorney General or any other officer of the government to institute such a suit in the absence of any act of Congress authorizing it. It was conceded that there was no express authority given to the Attorney General to institute that particular suit or any suit of that class. The question was one of very great interest, and was very ably argued both in the court below and in this court. The response of this court to that suggestion conceded that in the acts of Congress establishing the Department of Justice and defining the duties of the Attorney General there was no such express authority, and it was said that there was also no express authority to him to bring suits against debtors of the government upon

bonds, or to begin criminal prosecutions, or to institute criminal proceedings in any of the cases in which the United States was plaintiff, yet he was invested with the general superintendence of all such suits. It was further said: "If the United States, in any particular case, has a just cause for calling upon the judiciary of the country, in any of its courts, for relief by setting aside or annulling any of its contracts, its obligations, or its most solemn instruments, the question of the appeal to the judicial tribunals of the country must primarily be decided by the Attorney General of the United States. That such a power should exist somewhere, and that the United States should not be more helpless in relieving itself of frauds, impostures, and deceptions, than the private individual, is hardly open to argument. . . . There must, then, be an officer or officers of the government to determine when the United States shall sue, to decide for what it shall sue, and to be responsible that such suits shall be brought in appropriate cases. The attorneys of the United States in every judicial district are officers of this character, and they are by statute under the immediate supervision and control of the Attorney General. How, then, can it be argued that if the United States has been deceived, entrapped, or defrauded into the making, under the forms of law, of an instrument which injuriously affects its rights of property, or other rights, it cannot bring a suit to avoid the effect of such instrument, thus fraudulently obtained, without a special act of Congress in each case, or without some special authority applicable to this class of cases?" The same question was raised in the earlier case of *United States v. Hughes*, 11 How. 552, and decided the same way.

We cannot doubt the power of the President to take measures for the protection of a judge of one of the courts of the United States, who, while in the discharge of the duties of his office, is threatened with a personal attack which may probably result in his death, and we think it clear that where this protection is to be afforded through

the civil power, the Department of Justice is the proper one to set in motion the necessary means of protection. The correspondence already recited in this opinion between the marshal of the Northern District of California, and the Attorney General, and the district attorney of the United States for that district, although prescribing no very specific mode of affording this protection by the Attorney General, is sufficient, we think, to warrant the marshal in taking the steps which he did take, in making the provisions which he did make, for the protection and defence of Mr. Justice Field.

But there is positive law investing the marshals and their deputies with powers which not only justify what Marshal Neagle did in this matter, but which imposed it upon him as a duty. In chapter fourteen of the Revised Statutes of the United States, which is devoted to the appointments and duties of the district attorneys, marshals, and clerks of the courts of the United States, section 788 declares :

“The marshals and their deputies shall have, in each State, the same powers, in executing the laws of the United States, as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof.”

If, therefore, a sheriff of the State of California was authorized to do in regard to the laws of California what Neagle did, that is, if he was authorized to keep the peace, to protect a judge from assault and murder, then Neagle was authorized to do the same thing in reference to the laws of the United States.

Section 4176 of the Political Code of California reads as follows :

“The sheriff must:

“First. Preserve the peace.

“Second. Arrest and take before the nearest magistrate for examination all persons who attempt to commit or have committed a public offence.

“Third. Prevent and suppress all affrays, breaches of the



peace, riots and insurrections which may come to his knowledge. . . .”

And the Penal Code of California declares (section 197) that homicide is justifiable when committed by any person “when resisting any attempt to murder any person or to commit a felony or to do some great bodily injury upon any person;” or “when committed in defence of habitation, property or person against one who manifestly intends or endeavors by violence or surprise to commit a felony.”

That there is a peace of the United States; that a man assaulting a judge of the United States while in the discharge of his duties violates that peace; that in such case the marshal of the United States stands in the same relation to the peace of the United States which the sheriff of the county does to the peace of the State of California; are questions too clear to need argument to prove them. That it would be the duty of a sheriff, if one had been present at this assault by Terry upon Judge Field, to prevent this breach of the peace, to prevent this assault, to prevent the murder which was contemplated by it, cannot be doubted. And if, in performing this duty, it became necessary for the protection of Judge Field, or of himself, to kill Terry, in a case where, like this, it was evidently a question of the choice of who should be killed, the assailant and violator of the law and disturber of the peace, or the unoffending man who was in his power, there can be no question of the authority of the sheriff to have killed Terry. So the marshal of the United States, charged with the duty of protecting and guarding the judge of the United States court against this special assault upon his person and his life, being present at the critical moment, when prompt action was necessary, found it to be his duty, a duty which he had no liberty to refuse to perform, to take the steps which resulted in Terry’s death. This duty was imposed on him by the section of the Revised Statutes which we have recited, in connection with the powers conferred by the State of

California upon its peace officers, which become, by this statute, in proper cases, transferred as duties to the marshals of the United States.

But all these questions being conceded, it is urged against the relief sought by this writ of *habeas corpus*, that the question of the guilt of the prisoner of the crime of murder is a question to be determined by the laws of California, and to be decided by its courts, and that there exists no power in the government of the United States to take away the prisoner from the custody of the proper authorities of the State of California and carry him before a judge of the court of the United States, and release him without a trial by jury according to the laws of the State of California. That the statute of the United States authorizes and directs such a proceeding and such a judgment in a case where the offence charged against the prisoner consists in an act done in pursuance of a law of the United States and by virtue of its authority, and where the imprisonment of the party is in violation of the Constitution and laws of the United States, is clear by its express language.

The enactments now found in the Revised Statutes of the United States on the subject of the writ of *habeas corpus* are the result of a long course of legislation forced upon Congress by the attempt of the States of the Union to exercise the power of imprisonment over officers and other persons asserting rights under the federal government or foreign governments, which the States denied. The original act of Congress on the subject of the writ of *habeas corpus*, by its 14th section, authorized the judges and the courts of the United States, in the case of prisoners in jail or in custody under or by color of the authority of the United States, or committed for trial before some court of the same, or when necessary to be brought into court to testify, to issue the writ, and the judge or court before whom they were brought was directed to make inquiry into the cause of commitment. 1 Stat. 81, c. 20, § 14. This did not present the question,

or, at least, it gave rise to no question which came before the courts, as to releasing by this writ parties held in custody under the laws of the States. But when, during the controversy growing out of the nullification laws of South Carolina, officers of the United States were arrested and imprisoned for the performance of their duties in collecting the revenue of the United States in that State, and held by the state authorities, it became necessary for the Congress of the United States to take some action for their relief. Accordingly the act of Congress of March 2, 1833, 4 Stat. 634, c. 57, § 7, among other remedies for such condition of affairs, provided, by its 7th section, that the federal judges should grant writs of *habeas corpus* in all cases of a prisoner in jail or confinement, where he should be committed or confined on or by any authority or law, for any act done, or omitted to be done, in pursuance of a law of the United States, or any order, process or decree of any judge or court thereof.

The next extension of the circumstances on which a writ of *habeas corpus* might issue by the federal judges arose out of the celebrated *McLeod Case*, in which McLeod, charged with murder, in a state court of New York, had pleaded that he was a British subject, and that what he had done was under and by the authority of his government, and should be a matter of international adjustment, and that he was not subject to be tried by a court of New York under the laws of that State. The federal government acknowledged the force of this reasoning, and undertook to obtain from the government of the State of New York the release of the prisoner, but failed. He was, however, tried and acquitted, and afterwards released by the State of New York. This led to an extension of the powers of the federal judges under the writ of *habeas corpus*, by the act of August 29, 1842, 5 Stat. 539, c. 257, entitled "An act to provide further remedial justice in the courts of the United States." It conferred upon them the power to issue a writ of *habeas corpus*

in all cases where the prisoner claimed that the act for which he was held in custody was done under the sanction of any foreign power, and where the validity and effect of this plea depended upon the law of nations. In advocating the bill, which afterwards became a law, on this subject Senator Berrien, who introduced it into the Senate, observed : " The object was to allow a foreigner, prosecuted in one of the States of the Union for an offence committed in that State, but which he pleads has been committed under authority of his own sovereign or the authority of the law of nations, to be brought up on that issue before the only competent judicial power to decide upon matters involved in foreign relations or the law of nations. The plea must show that it has reference to the laws or treaties of the United States or the law of nations, and showing this, the writ of *habeas corpus* is awarded to try that issue. If it shall appear that the accused has a bar on the plea alleged, it is right and proper that he should not be delayed in prison awaiting the proceedings of the state jurisdiction on the preliminary issue of his plea at bar. If satisfied of the existence in fact and validity in law of the bar, the federal jurisdiction will have the power of administering prompt relief." No more forcible statement of the principle on which the law of the case now before us stands can be made.

The next extension of the powers of the court under the writ of *habeas corpus* was the act of February 5, 1867, 14 Stat. 385, c. 28, and this contains the broad ground of the present Revised Statutes, under which the relief is sought in the case before us, and includes all cases of restraint of liberty in violation of the Constitution or a law or treaty of the United States, and declares that " the said court or judge shall proceed in a summary way to determine the facts of the case, by hearing testimony and the arguments of the parties interested, and if it shall appear that the petitioner is deprived of his or her liberty in contravention of the Constitution or laws of the United States, he or she shall forthwith be discharged and set at liberty."



It would seem as if the argument might close here. If the duty of the United States to protect its officers from violence, even to death, in discharge of the duties which its laws impose upon them, be established, and Congress has made the writ of *habeas corpus* one of the means by which this protection is made efficient, and if the facts of this case show that the prisoner was acting both under the authority of law, and the directions of his superior officers of the Department of Justice, we can see no reason why this writ should not be made to serve its purpose in the present case.

We have already cited such decisions of this court as are most important and directly in point, and there is a series of cases decided by the Circuit and District Courts to the same purport. Several of these arose out of proceedings under the fugitive slave law, in which the marshal of the United States, while engaged in apprehending the fugitive slave with a view to returning him to his master in another State, was arrested by the authorities of the State. In many of these cases they made application to the judges of the United States for relief by the writ of *habeas corpus*, which give rise to several very interesting decisions on this subject.

In *Ex parte Jenkins*, 2 Wall. Jr. 521, 529, the marshal, who had been engaged, while executing a warrant, in arresting a fugitive, in a bloody encounter, was himself arrested under a warrant of a justice of the peace for assault with intent to kill, which makes the case very analogous to the one now under consideration. He presented to the Circuit Court of the United States for the Eastern District of Pennsylvania a petition for a writ of *habeas corpus*, which was heard before Mr. Justice Grier, who held that under the act of 1833, already referred to, the marshal was entitled to his discharge, because what he had done was in pursuance of and by the authority conferred upon him by the act of Congress concerning the rendition of fugitive slaves. He said: "The authority conferred on the judges

of the United States by this act of Congress gives them all the power that any other court could exercise under the writ of *habeas corpus*, or gives them none at all. If under such a writ they may not discharge their officer when imprisoned 'by any authority' for an act done in pursuance of a law of the United States, it would be impossible to discover for what useful purpose the act was passed." It "was passed when a certain State of this Union had threatened to nullify acts of Congress, and to treat those as criminals who should attempt to execute them; and it was intended as a remedy against such state legislation."

This same matter was up again when the fugitive slave, Thomas, had the marshal arrested in a civil suit for an alleged assault and battery. He was carried before Judge Kane on another writ of *habeas corpus* and again released. 2 Wall. Jr. 531. A third time the marshal, being indicted, was arrested on a bench warrant issued by the state court, and again brought before the Circuit Court of the United States by a writ of *habeas corpus* and discharged. Some remarks of Judge Kane on this occasion are very pertinent to the objections raised in the present case. He said, 2 Wall. Jr. 543: "It has been urged that my order, if it shall withdraw the relators from the prosecution pending against them [in the state court], will in effect prevent their trial by jury at all, since there is no act of Congress under which they can be indicted for an abuse of process. It will not be an anomaly, however, if the action of this court shall interfere with the trial of these prisoners by a jury. Our constitutions secure that mode of trial as a right to the accused; but they nowhere recognize it as a right of the government, either state or federal, still less of an individual prosecutor. The action of a jury is overruled constantly by the granting of new trials after conviction. It is arrested by the entering of *nolle prosequis*, while the case is at bar. It is made ineffectual at any time by the discharge on *habeas corpus*. . . . And there is no harm in this. No one

imagines that because a man is accused he must therefore, of course, be tried. Public prosecutions are not devised for the purpose of indemnifying the wrongs of individuals, still less of retaliating upon them."

Many other decisions by the Circuit and District Courts, to the same purport, are to be found, among them the following: *Ex parte Robinson*, 6 McLean, 355; 4 Amer. Law Register, 617; *Roberts v. Jailer of Fayette Co.*, 2 Abbott (U. S.) 265; *In re Ramsey*, 2 Flippin, 451; *In re Neill*, 8 Blatchford, 156; *Ex parte Bridges*, 2 Woods, 428; *Ex parte Royall*, 117 U. S. 241.

Similar language was used by Mr. Choate in the Senate of the United States upon the passage of the act of 1842. He said: "If you have the power to interpose after judgment, you have the power to do so before. If you can reverse a judgment, you can anticipate its rendition. If, within the Constitution, your judicial power extends to these cases or these controversies, whether you take hold of the case or controversy at one stage or another, is totally immaterial. The single question submitted to the national tribunal, the question whether, under the statute adopting the law of nations, the prisoner is entitled to the exemption or immunity he claims, may as well be extracted from the entire case, and presented and decided in those tribunals before any judgment in the state court, as for it to be revised afterwards on a writ of error. Either way, they pass on no other question. Either way, they do not administer the criminal law of a State. In the one case as much as in the other, and no more, do they interfere with state judicial power."

The same answer is given in the present case. To the objection made in argument, that the prisoner is discharged by this writ from the power of the state court to try him for the whole offence, the reply is, that if the prisoner is held in the state court to answer for an act which he was authorized to do by the law of the United States, which it was his duty to do as marshal of the United States, and if

in doing that act he did no more than what was necessary and proper for him to do, he *cannot* be guilty of a crime under the law of the State of California. When these things are shown, it is established that he is innocent of any crime against the laws of the State, or of any other authority whatever. There is no occasion for any further trial in the state court, or in any court. The Circuit Court of the United States was as competent to ascertain these facts as any other tribunal, and it was not at all necessary that a jury should be impanelled to render a verdict on them. It is the exercise of a power common under all systems of criminal jurisprudence. There must always be a preliminary examination by a committing magistrate, or some similar authority, as to whether there is an offence to be submitted to a jury, and if this is submitted in the first instance to a grand jury, that is still not the right of trial by jury which is insisted on in the present argument.

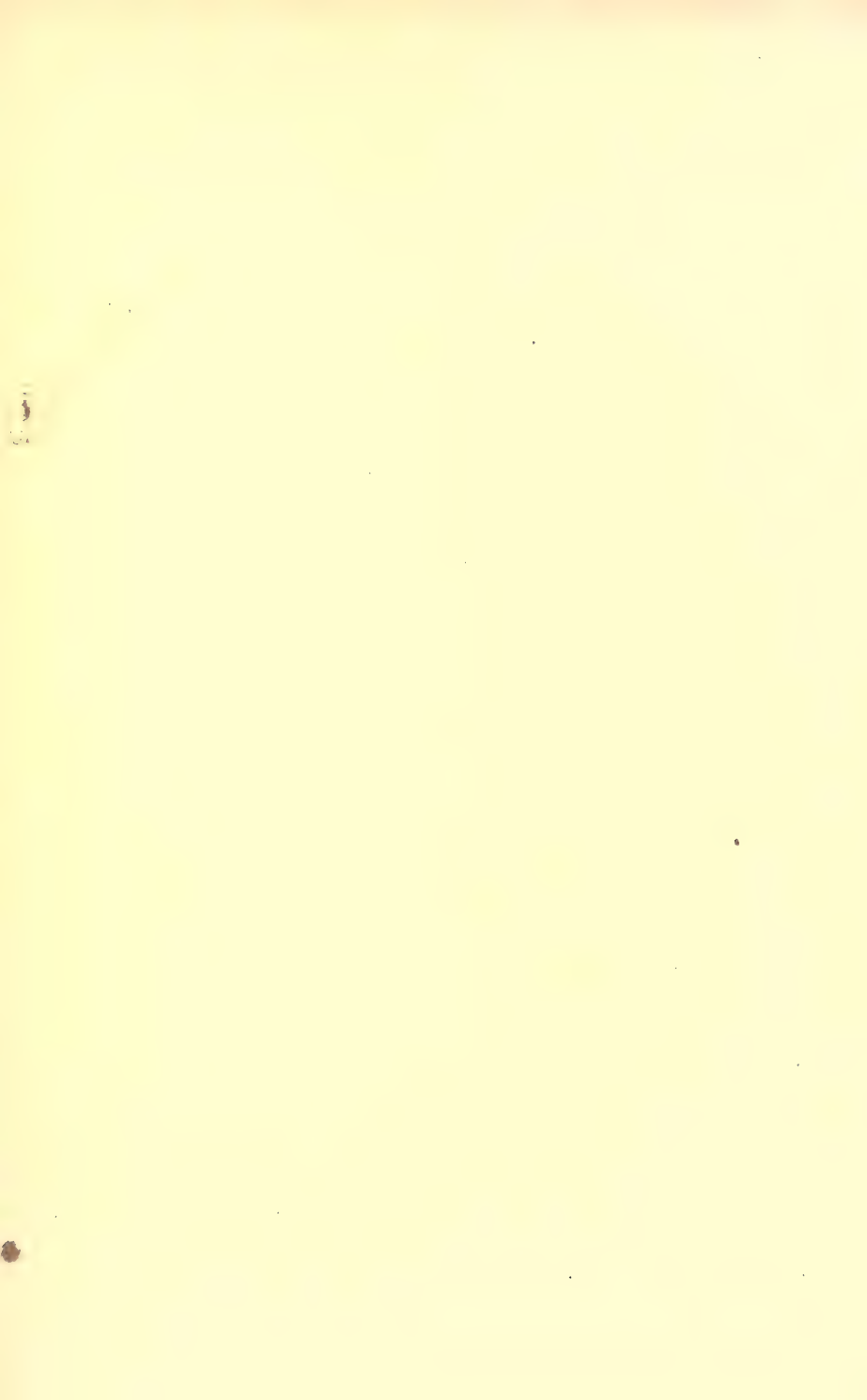
We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the Circuit Court and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require.

The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the judge would have ended in the death of the latter; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of



the man who was intended to be his victim; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in so doing; and that he is not liable to answer in the courts of California on account of his part in that transaction.

*We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin County.*



THE STORY  
OF THE  
ATTEMPTED ASSASSINATION  
OF  
JUSTICE FIELD  
BY A  
FORMER ASSOCIATE ON THE SUPREME BENCH  
OF CALIFORNIA.

---

By HON. GEORGE C. GORHAM.





THE STORY  
OF THE  
ATTEMPTED ASSASSINATION  
OF  
JUSTICE FIELD  
BY A  
FORMER ASSOCIATE ON THE SUPREME BENCH  
OF CALIFORNIA.

---

BY HON. GEORGE C. GORHAM.



NOTE BY THE PUBLISHERS.

Mr. Gorham is a life-long friend of Justice Field. He was his clerk when the latter held the Alcalde's Court in Marysville, in 1850; and was Clerk of the U. S. Circuit Court of the District of California when it was organized, after Judge Field's appointment to the U. S. Supreme Bench. Subsequently, and for several years, he was Secretary of the U. S. Senate. Since his retirement from office he has resided in Washington. For a part of the time he edited a Republican paper in that city, but of late years he has been chiefly engaged in literary works, of which the principal one is the life and history of the late Secretary of War, Edwin M. Stanton.

# INDEX.

---

	PAGE.
ATTEMPTED ASSASSINATION OF JUSTICE FIELD BY A FORMER ASSO- CIATE ON THE STATE SUPREME BENCH.....	5
CHAPTER I..... The Sharon-Hill-Terry Litigation.	8
CHAPTER II..... Proceedings in the Superior Court of the State.	15
CHAPTER III..... Proceedings in the United States Circuit Court.	25
CHAPTER V..... Decision of the Case in the Federal Court.	32
CHAPTER VI..... The Marriage of Terry and Miss Hill.	34
CHAPTER VII..... The Bill of Revivor.	40
CHAPTER VIII..... The Terrys Imprisoned for Contempt.	46
CHAPTER IX..... Terry's Petition to the Circuit Court for a Release—Its Refusal—He Appeals to the Supreme Court—Unani- mous Decision against Him there.	56
CHAPTER X..... President Cleveland refuses to Pardon Terry—False Statements of Terry Refuted.	65
CHAPTER XI..... Terry's continued Threats to Kill Justice Field—Return of the Latter to California in 1889.	74

	PAGE.
CHAPTER XII.....	77
Further Proceedings in the State Court.—Judge Sullivan's Decision Reversed.	
CHAPTER XIII.....	83
Attempted Assassination of Justice Field, Resulting in Terry's own Death at the Hands of a Deputy United States Marshal.	
CHAPTER XIV.....	102
Sarah Althea Terry Charges Justice Field and Deputy Marshal Neagle with Murder.	
CHAPTER XV.....	106
Justice Field's Arrest and Petition for Release on Habeas Corpus.	
CHAPTER XVI.....	113
Judge Terry's Funeral—Refusal of the Supreme Court of California to Adjourn on the Occasion.	
CHAPTER XVII.....	116
Habeas Corpus Proceedings in Justice Field's Case.	
CHAPTER XVIII.....	124
Habeas Corpus Proceedings in Neagle's Case.	
CHAPTER XIX.....	142
Expressions of Public Opinion.	
CHAPTER XX.....	176
The Appeal to the Supreme Court of the United States, and the Second Trial of Sarah Althea's Divorce Case.	
CHAPTER XXI....	190
Concluding Observations.	

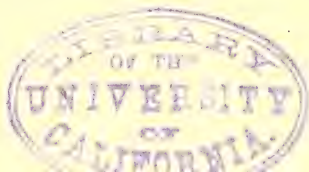


ATTEMPTED ASSASSINATION OF JUSTICE FIELD  
BY A FORMER ASSOCIATE ON THE STATE  
SUPREME BENCH.

---

THE most thrilling episode in the eventful life of Justice Field was his attempted assassination at Lathrop, California, on the 14th day of August, 1889, by David S. Terry, who had been Chief Justice of the State during a portion of Justice Field's service on that bench. Terry lost his own life in his desperate attempt, by the alertness and courage of David S. Neagle, a Deputy United States Marshal, who had been deputed by his principal, under an order from the Attorney-General of the United States, to protect Justice Field from the assassin, who had, for nearly a year, boldly and without concealment, proclaimed his murderous purpose. The motive of Terry was not in any manner connected with their association on the State supreme bench, for there had never been any but pleasant relations between them.

Terry resigned from the bench in 1859 to challenge Senator Broderick of California to the duel in which the latter was killed. He entered the Confederate service during the war, and some time after its close he



returned to California, and entered upon the practice of the law. In 1880 he was a candidate for Presidential elector on the Democratic ticket. His associates on that ticket were all elected, while he was defeated by the refusal of a number of the old friends of Broderick to give him their votes. It is probable that his life was much embittered by the intense hatred he had engendered among the friends of Broderick, and the severe censure of a large body of the people of the State, not especially attached to the political fortunes of the dead Senator. These facts are mentioned as furnishing a possible explanation of Judge Terry's marked descent in character and standing from the Chief-Justiceship of the State to being the counsel, partner, and finally the husband of the discarded companion of a millionaire in a raid upon the latter's property in the courts. It was during the latter stages of this litigation that Judge Terry became enraged against Justice Field, because the latter, in the discharge of his judicial duties, had been compelled to order the revival of a decree of the United States Circuit Court, in the rendering of which he had taken no part.

A proper understanding of this exciting chapter in the life of Justice Field renders necessary a narrative of the litigation referred to. It is doubtful if the annals of the courts or the pages of romance can parallel

this conspiracy to compel a man of wealth to divide his estate with adventurers. Whether it is measured by the value of the prize reached for, by the character of the conspirators, or by the desperate means to which they resorted to accomplish their object, it stands in the forefront of the list of such operations.

## CHAPTER I.

### THE SHARON-HILL-TERRY LITIGATION.

The victim, upon a share of whose enormous estate, commonly estimated at \$15,000,000, these conspirators had set their covetous eyes, was William Sharon, then a Senator from the State of Nevada. The woman with whom he had terminated his relations, because he believed her to be dangerous to his business interests, was Sarah Althea Hill. Desirous of turning to the best advantage her previous connection with him, she sought advice from an old negress of bad repute, and the result was a determination to claim that she had a secret contract of marriage with him. This negress, who during the trial gave unwilling testimony to having furnished the sinews of war in the litigation to the extent of at least five thousand dollars, then consulted G. W. Tyler, a lawyer noted for his violent manner and reckless practices, who explained to her what kind of a paper would constitute a legal marriage contract under the laws of California. No existing contract was submitted to him, but he gave his written opinion as to what kind of a contract it would be good to have for the purpose. The pretended contract was then manufactured by Sarah Althea in accordance with this opinion, and



Tyler subsequently made a written agreement with her by which he was to act as her attorney, employ all necessary assistance, and pay all expenses, and was to have one-half of all they could get out of Sharon by their joint efforts as counsel and client. This contract was negotiated by an Australian named Neilson, who was to have one-half of the lawyer's share.

On the 7th of September, 1883, a demand was made upon Mr. Sharon for money for Miss Hill. He drove her emissary, Neilson, out of the hotel where he had called upon him, and the latter appeared the next day in the police court of San Francisco and made an affidavit charging Mr. Sharon with the crime of adultery. A warrant was issued for the latter's arrest, and he was held to bail in the sum of \$5,000. This charge was made for the avowed purpose of establishing the manufactured contract of marriage already referred to, which bore date three years before. A copy of this alleged contract was furnished to the newspapers together with a letter having Sharon's name appended to it, addressed at the top to "My Dear Wife," and at the bottom to "Miss Hill." This pretended contract and letter Mr. Sharon denounced as forgeries.

On the 3d of October, 1883, Mr. Sharon commenced suit in the United States Circuit Court at San Francisco against Sarah Althea Hill, setting forth in his complaint that he was a citizen of the State of Nevada, and she a citizen of California ;

“that he was, and had been for years, an unmarried man ; that formerly he was the husband of Maria Ann Sharon, who died in May, 1875, and that he had never been the husband of any other person ; that there were two children living, the issue of that marriage, and also grandchildren, the children of a deceased daughter of the marriage ; that he was possessed of a large fortune in real and personal property ; was extensively engaged in business enterprises and ventures, and had a wide business and social connection ; that, as he was informed, the defendant was an unmarried woman of about thirty years of age, for some time a resident of San Francisco ; that within two months then past she had repeatedly and publicly claimed and represented that she was his lawful wife ; that she falsely and fraudulently pretended that she was duly married to him on the twenty-fifth day of August, 1880, at the city and county of San Francisco ; that on that day they had jointly made a declaration of marriage showing the names, ages, and residences of the parties, jointly doing the acts required by the Civil Code of California to constitute a marriage between them, and that thereby they became and were husband and wife according to the law of that State.

“The complainant further alleged that these several claims, representations, and pretensions were wholly and maliciously false, and were made by her for the purpose of injuring him in his property, business, and social relations ; for the purpose of obtaining credit by the use of his name with merchants and others, and thereby compelling him to maintain her ; and for the purpose of harassing him, and in case of his death, his heirs and next of kin and legatees, into payment of large sums of money to quiet her false and fraudulent claims and pretensions. He also set forth what he was informed was a copy of the declaration of marriage, and alleged that if she had any such instrument, it was ‘false,

forged, and counterfeited;’ that he never, on the day of its date, or at any other time, made or executed any such document or declaration, and never knew or heard of the same until within a month previous to that time, and that the same was null and void as against him, and ought, in equity and good conscience, to be so declared, and ordered to be delivered up, to be annulled and cancelled.”

The complaint concluded with a prayer that it be adjudged and decreed that the said Sarah Althea Hill was not and never had been his wife; that he did not make the said joint declaration of marriage with her, or any marriage between them; that said contract or joint declaration of marriage be decreed and adjudged false, fraudulent, forged, and counterfeited, and ordered to be delivered up and cancelled and annulled, and that she be enjoined from setting up any claims or pretensions of marriage thereby. Sharon was a citizen of Nevada, while Miss Hill was a citizen of California.\*

---

\*NOTE.—A court of equity having jurisdiction to lay its hands upon and control forged and fraudulent instruments, it matters not with what pretensions and claims their validity may be asserted by their possessor; whether they establish a marriage relation with another, or render him an heir to an estate, or confer a title to designated pieces of property, or create a pecuniary obligation. It is enough that, unless set aside or their use restrained, they may impose burdens upon the complaining party, or create claims upon his property by which its possession and enjoyment may be destroyed or impaired. (*Sharon vs. Terry*, 13 Sawyer’s Rep., 406.) The Civil Code of California also declares that “a written instrument in respect to which there is a reasonable apprehension that, if left outstanding, it may cause serious injury to a person against whom it is void or voidable, may, upon his application, be so adjudged, and ordered to be delivered up or cancelled” (Sec. 3412).

Before the time expired in which Miss Hill was required to answer the complaint of Mr. Sharon in the United States Circuit Court, but not until after the federal jurisdiction had attached in that court, she brought suit against him, November 1st, in a state Superior Court, in the city and county of San Francisco, to establish their alleged marriage and then obtain a decree, and a division of the property stated to have been acquired since such marriage. In her complaint she alleged that on the 25th day of August, 1880, they became, by mutual agreement, husband and wife, and thereafter commenced living together as husband and wife; that on that day they had jointly made a declaration of marriage in writing, signed by each, substantially in form as required by the Civil Code of California, and until the month of November, 1881, had lived together as husband and wife; that since then the defendant had been guilty of sundry violations of the marriage contract. The complaint also alleged that when the parties intermarried the defendant did not have in money or property more than five millions of dollars, with an income not exceeding thirty thousand dollars a month, but that since their intermarriage they had by their prudent management of mines, fortunate speculations, manipulations of the stock market, and other business enterprises, accumulated in money and property more than ten millions of



dollars, and that now he had in his possession money and property of the value at least of fifteen millions of dollars, from which he received an income of over one hundred thousand dollars a month. The complaint concluded with a prayer that the alleged marriage with the defendant might be declared legal and valid, and that she might be divorced from him, and that an account be taken of the common property, and that the same be equally divided between them.

The campaign was thus fully inaugurated, which for more than six years disgraced the State with its violence and uncleanness, and finally ended in bloodshed. The leading combatants were equally resolute and determined. Mr. Sharon, who was a man of remarkable will and energy, would have expended his entire fortune in litigation before he would have paid tribute to those who thus attempted to plunder him. Sarah Althea Hill was respectably connected, but had drifted away from her relations, and pursued, without restraint, her disreputable course. She affected a reckless and daredevil character, carrying a pistol, and exhibiting it on occasions in cow-boy fashion, to convey the impression that those who antagonized her had a dangerous character with whom to deal. She was ignorant, illiterate, and superstitious. The forged document which she thought to make a passport to the enjoyment of a share of Sharon's millions was a

clumsy piece of work. It was dated August 25, 1880, and contained a clause pledging secrecy for two years thereafter. But she never made it public until September, 1883, although she had, nearly two years before that, been turned out of her hotel by Sharon's orders. At this treatment she only whimpered and wrote begging letters to him, not once claiming, even in these private letters to him, to be his wife. She could then have published the alleged contract without any violation of its terms, and claimed any rights it conferred, and it is obvious to any sane man that she would have done so had any such document then been in existence.

Although Sharon's case against Sarah Althea Hill was commenced in the federal court before the commencement of Miss Hill's case against Sharon in the state court, the latter case was first brought to trial, on the 10th of March, 1884.

## CHAPTER II.

### PROCEEDINGS IN THE SUPERIOR COURT OF THE STATE.

Mr. Sharon defended in the state court, and prosecuted in the federal court with equal energy. In the former he made an affidavit that the pretended marriage contract was a forgery and applied to the court for the right to inspect it, and to have photographic copies of it made. Sarah Althea resisted the judge's order to produce the document in question, until he informed her that, if she did not obey, the paper would not be admitted as evidence on the trial of the action.

On the second day of the trial in the state court Miss Hill reinforced her cause by the employment of Judge David S. Terry as associate counsel. He brought to the case a large experience in the use of deadly weapons, and gave the proceedings something of the character of the ancient "wager of battle." Numerous auxiliaries and supernumeraries in the shape of lesser lawyers, fighters, and suborned witnesses were employed in the proceedings as from time to time occasion required. The woman testified in her own behalf that upon a visit to Mr. Sharon's office he had offered to pay her \$1,000 per month if she would become his mistress; that she declined his offer in a

business-like manner, without anger, and entered upon a conversation about getting married; she swore at a subsequent interview she drafted a marriage contract at Sharon's dictation. This document, to which she testified as having been thus drawn up, is as follows :

" In the city and county of San Francisco, State of California, on the 25th day of August, A. D., 1880, I, Sarah Althea Hill, of the city and county of San Francisco, State of California, aged twenty-seven years, do here, in the presence of almighty God, take Senator William Sharon, of the State of Nevada, to be my lawful and wedded husband, and do here acknowledge and declare myself to be the wife of Senator William Sharon, of the State of Nevada.

" SARAH ALTHEA HILL.

" AUGUST 25, 1880, SAN FRANCISCO, CAL.

---

" I agree not to make known the contents of this paper or its existence for two years unless Mr. Sharon, himself, sees fit to make it known.

" SARAH ALTHEA HILL.

---

" In the city and county of San Francisco, State of California, on the 25th day of August, A. D. 1880, I, Senator William Sharon, of the State of Nevada, aged sixty years, do here, in the presence of Almighty God, take Sarah Althea Hill, of the city and county of San Francisco, California, to be my lawful and wedded wife, and do here acknowledge myself to be the husband of Sarah Althea Hill.

" WILLIAM SHARON,

" Nevada.

" AUGUST 25, 1880."

In his testimony Mr. Sharon contradicted every ma-



terial statement made by Sarah Althea Hill. He denied every circumstance connected with the alleged drawing up of the marriage contract.

He testified that on the 7th day of November, 1881, he terminated his relations with and dismissed her, and made a full settlement with her by the payment of \$3,000 in cash, and notes amounting to \$4,500. For these she gave him a receipt in full. He charged her with subsequently stealing that receipt at one of two or three visits made by her after her discharge.

It is unnecessary to review the voluminous testimony introduced by the parties in support of their respective contentions. The alleged contract was clearly proven to be a forgery. A number of witnesses testified to conversations had with Miss Hill long after the date of the pretended marriage contract, in which she made statements entirely inconsistent with the existence of such a document. She employed fortune-tellers to give her charms with which she could compel Mr. Sharon to marry her, and this, too, when she pretended to have in her possession the evidence that she was already his wife. Not an appearance of probability attended the claim of this bold adventuress. Every statement she made concerning the marriage contract, and every step she took in her endeavor to enforce it, betrayed its false origin.

The trial of the case in the state court continued

from March 10th until May 28th, when the summer recess intervened. It was resumed July 15th, and occupied the court until September 17th, on which day the argument of counsel was concluded and the case submitted. No decision was rendered until more than three months afterwards, namely, December 24th. Nearly two months were then allowed to pass before the decree was entered, February 19, 1885. The case was tried before Judge Sullivan without a jury, by consent of the parties. He decided for the plaintiff, holding the marriage contract to be genuine, and to constitute a valid marriage. It was manifest that he made his decision solely upon the evidence given by Sarah Althea herself, whom he nevertheless branded in his opinion as a perjurer, suborner of perjury, and forger. Lest this should seem an exaggeration his own words are here quoted. She stated that she was introduced by Sharon to certain parties as his wife. Of her statements to this effect the Judge said :

“Plaintiff’s testimony as to these occasions is directly contradicted, and in my judgment her testimony as to these matters is wilfully false.”

Concerning \$7,500 paid her by Sharon, which she alleged she had placed in his hands in the early part of her acquaintance with him, the Judge said :

“This claim, in my judgment, is utterly unfounded. No such advance was ever made.”

At another place in his opinion the Judge said :

“Plaintiff claims that defendant wrote her notes at different times after her expulsion from the Grand Hotel. If such notes were written, it seems strange that they have not been preserved and produced in evidence. I do not believe she received any such notes.”

With respect to another document which purported to have been signed by Mr. Sharon, and which Sarah Althea produced under compulsion, then withdrew it, and failed to produce it afterwards, when called for, saying she had lost it, Judge Sullivan said :

“Among the objections suggested to this paper as appearing on its face, was one made by counsel that the signature was evidently a forgery. The matters recited in the paper are, in my judgment, at variance with the facts it purports to recite. Considering the stubborn manner in which the production of this paper was at first resisted and the mysterious manner of its disappearance, I am inclined to regard it in the light of one of the fabrications for the purpose of bolstering up plaintiff’s case. I can view the paper in no other light than as a fabrication.”

In another part of his opinion Judge Sullivan made a sort of a general charge of perjury against her in the following language :

“I am of the opinion that to some extent plaintiff has availed herself of the aid of false testimony for the purpose of giving her case a better appearance in the eyes of the court, but sometimes parties have been known to resort to false testimony, where in their judg-

ment it would assist them in prosecuting a lawful claim. As I understand the facts of this case, that was done in this instance."

In another place Judge Sullivan said :

"I have discussed fully, in plain language, the numerous false devices resorted to by the plaintiff for the purpose of strengthening her case."

Miss Sarah and her attorneys had now come in sight of the promised land of Sharon's ample estate. Regular proceedings, however, under the law, seemed to them too slow; and besides there was the peril of an adverse decision of the Supreme Court on appeal. They then decided upon a novel course. Section 137 of the Civil Code of California provides that while an action for divorce is pending, the court may, in its discretion, require the husband to pay as alimony any money necessary to enable the wife to support herself and to prosecute or defeat the action. The enterprising attorneys, sharing the bold spirit of their client, and presuming upon the compliance of a judge who had already done so well by them, went into the court on the 8th of January, 1885, and modestly demanded for Sarah Althea, upon the sole authority of the provision of law above quoted, \$10,000 per month, as the money necessary to enable her to support herself, and \$150,000 for attorneys' fees to prosecute the action. This was to include back pay for thirty-eight months, making a



sum of \$380,000, which added to the \$150,000, attorneys' fees, would have made a grand total of \$530,000. This was an attempt, under the color of a beneficent law, applicable only to actions for divorce, in which the marriage was not denied, to extort from a man more than one-half million dollars, for the benefit of a woman, seeking first to establish a marriage, and then to secure a divorce, in a case in which no decree had as yet been entered, declaring her to be a wife. It was not merely seeking the money necessary to support the plaintiff and prosecute the case ; it was a request that the inferior court should confiscate more than half a million dollars, in anticipation of a decision of the Supreme Court on appeal. It was as bold an attempt at spoliation as the commencement of the suit itself. The Supreme Court of the State had decided that the order of a Superior Court allowing alimony during the pendency of any action for divorce is not appealable, but it had not decided that, under the pretence of granting alimony, an inferior judge could apportion a rich man's estate among champerty lawyers, and their adventurous client, by an order from which there could be no appeal, made prior to any decree that there had ever been a marriage between the parties, when the fact of the marriage was the main issue in the case. The counsel for Sharon insisted upon his right to have a decree entered from which he could appeal, before

being thus made to stand and deliver, and the court entertained the motion.

Upon this motion, among other affidavits read in opposition, was one by Mr. Sharon himself, in which he recited the agreement between Miss Hill and her principal attorney, George W. Tyler, in which she was to pay him for his services, one-half of all she might receive in any judgment obtained against Sharon, he, Tyler, advancing all the costs of the litigation. The original of this agreement had been filed by Tyler with the county clerk immediately after the announcement of the opinion in the case as an evidence of his right to half of the proceeds of the judgment. It was conclusive evidence that Sarah Althea required no money for the payment of counsel fees.

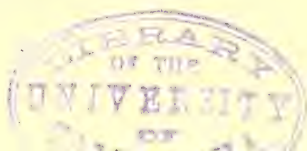
After the filing of a mass of affidavits, and an exhaustive argument of the motion, Judge Sullivan rendered his decision, February 16, 1885, granting to Sarah Althea Hill an allowance of \$2,500 per month, to take effect as of the date of the motion, January 8, 1885, and further sums of \$2,500 each to be paid on the 8th day of April, and of each succeeding month until further order of the court.

This the Judge thought reasonable allowance "in view of the plaintiff's present circumstances and difficulties." For counsel fees he allowed the sum of \$60,000, and at the request of the victors, made in advance, he divided the spoils among them as follows :

To Tyler and Tyler.....	\$25,000
To David S. Terry .....	10,000
To Moon and Flournoy.....	10,000
To W. H. Levy .....	10,000
To Clement, Osmond and Clement...	5,000

By what rule \$2,500 was awarded as a proper monthly allowance to the woman whose services to Mr. Sharon had commanded but \$500 per month it is difficult to conjecture. It was benevolence itself to give \$60,000 to a troop of lawyers enlisted under the command of Tyler, who had agreed to conduct the proceedings wholly at his own cost, for one-half of what could be made by the buccaneering enterprise. It seemed to be the purpose of these attorneys to see how much of Mr. Sharon's money they could, with Judge Sullivan's assistance, lay their hands upon before the entry of the judgment in the case. From the judgment an appeal could be taken. By anticipating its entry they thought that they had obtained an order from which no appeal would lie.

It was not until three days after this remarkable order was made that the decree was entered by Judge Sullivan declaring plaintiff and defendant to be husband and wife; that he had deserted her, and that she was entitled to a decree of divorce, with one-half of the common property accumulated by the parties since the date of what he decided to be a valid marriage contract.



Sharon appealed from the final judgment, and also from the order for alimony. Notwithstanding this appeal, and the giving of a bond on appeal in the sum of \$300,000 to secure the payment of all alimony and counsel fees, Judge Sullivan granted an order directing Mr. Sharon to show cause why he should not be punished for contempt in failing to pay alimony and counsel fees, as directed by the order.

The Supreme Court, upon application, granted an order temporarily staying proceedings in the case. This stay of proceedings was subsequently made permanent, during the pendency of the appeal.

Mr. Sharon died November 15, 1885. That very day had been set for a hearing of Sharon's motion for a new trial. The argument was actually commenced on that day and continued until the next, at which time the motion was ordered off the calendar because meantime Mr. Sharon had deceased.



## CHAPTER III.

### PROCEEDINGS IN THE UNITED STATES CIRCUIT COURT.

While these proceedings were being had in the state courts the case of Sharon vs. Hill in the federal court was making slow progress. Miss Hill's attorneys seemed to think that her salvation depended upon reaching a decision in her case before the determination of Sharon's suit in the United States Circuit Court. They were yet to learn, as they afterwards did, that after a United States court takes jurisdiction in a case, it cannot be ousted of that jurisdiction by the decision of a state court, in a proceeding subsequently commenced in the latter. Seldom has "the law's delay" been exemplified more thoroughly than it was by the obstacles which her attorneys were able to interpose at every step of the proceedings in the federal court.

Sharon commenced his suit in the United States Circuit Court October 3, 1883, twenty-eight days before his enemy commenced hers in the State Superior Court. By dilatory pleas her counsel succeeded in delaying her answer to Sharon's suit until after the decision in her favor in the state court. She did not enter an appearance in the federal court until the very

last day allowed by the rule. A month later she filed a demurrer. Her counsel contrived to delay the argument of this demurrer for seven weeks after it was filed. It was finally argued and submitted on the 21st of January, 1884. On the 3d of March it was overruled and the defendant was ordered to answer in ten days, to wit, March 13th. Then the time for answering was extended to April 24th. When that day arrived her counsel, instead of filing an answer, filed a plea in abatement, denying the non-residence of Mr. Sharon in the State of California, on which depended his right to sue in the federal court. To this Mr. Sharon's counsel filed a replication on the 5th of May. It then devolved upon Miss Hill's counsel to produce evidence of the fact alleged in the plea, but, after a delay of five months and ten days, no evidence whatever was offered, and the court ordered the plea to be argued on the following day. It was overruled, and thirty days were given to file an answer to Sharon's suit. The case in the state court had then been tried, argued, and submitted thirty days before, but Miss Hill's counsel were not yet ready to file their answer within the thirty days given them, and the court extended the time for answer until December 30th. Six days before that day arrived Judge Sullivan rendered his decision. At last, on the 30th of December, 1884, fourteen months after the filing of Sharon's complaint, Sarah Althea's answer

was filed in the federal court, in which, among other things, she set up the proceedings and decree of the state court, adjudging the alleged marriage contract to be genuine and legal, and the parties to be husband and wife, and three days later Sharon filed his replication. There was at no time any delay or want of diligence on the part of the plaintiff in prosecuting this suit to final judgment. On the contrary, as is plainly shown in the record above stated, the delays were all on the part of the defendant. The taking of the testimony in the United States Circuit Court commenced on the 12th of February, 1885, and closed on the 12th of August following.

The struggle in the state court was going on during all the time of the taking of the testimony in the federal court, and intensified the excitement attendant thereon. Miss Hill was in constant attendance before the examiner who took the testimony, often interrupting the proceedings with her turbulent and violent conduct and language, and threatening the lives of Mr. Sharon's counsel. She constantly carried a pistol, and on occasions exhibited it during the examination of witnesses, and, pointing it at first one and then another, expressed her intention of killing them at some stage of the proceedings. She was constantly in contempt of the court, and a terror to those around her. Her conduct on one occasion, in August, 1885, became so

violent that the taking of the testimony could not proceed, and Justice Field, the presiding judge of the circuit, made an order that she should be disarmed, and that a bailiff of the court should sit constantly at her side to restrain her from any murderous outbreak, such as she was constantly threatening. Her principal attorney, Tyler, was also most violent and disorderly. Judge Terry, while less explosive, was always ready to excuse and defend his client. (See Report of Proceedings in *Sharon vs. Hill*, 11 Sawyer's Circuit Court Reps., 122.)

Upon the request of counsel for the complainant, the examiner in one case reported to the court the language and the conduct of Miss Hill. Among other things, he reported her as saying :

"When I see this testimony [from which certain scandalous remarks of hers were omitted] I feel like taking that man Stewart\* out and cowhiding him. I will shoot him yet ; that very man sitting there. To think that he would put up a woman to come here and deliberately lie about me like that. I will shoot him. They know when I say I will do it that I will do it. I shall shoot him as sure as you live ; that man that is sitting right there. And I shall have that woman Mrs. Smith arrested for this, and make her prove it."

And again :

"I can hit a four-bit piece nine times out of ten."

The examiner said that pending the examination of

---

\* Senator Stewart, who was one of the counsel against her in the suit.



one of the witnesses, on the occasion mentioned, the respondent drew a pistol from her satchel, and held it in her right hand ; the hand resting for a moment upon the table, with the weapon pointed in the direction of Judge Evans. He also stated that on previous occasions she had brought to the examiner's room during examinations a pistol, and had sat for some length of time holding it in her hand, to the knowledge of all persons present at the time. After the reading of the examiner's report in open court, Justice Field said :

“ In the case of William Sharon versus Sarah Althea Hill, the Examiner in Chancery appointed by the court to take the testimony has reported to the court that very disorderly proceedings took place before him on the 3d instant ; that at that day, in his room, when counsel of the parties and the defendant were present, and during the examination of a witness by the name of Piper, the defendant became very much excited, and threatened to take the life of one of the counsel, and that subsequently she drew a pistol and declared her intention to carry her threat into effect. It appears also from the report of the examiner that on repeated occasions the defendant has attended before him, during the examination of witnesses, armed with a pistol. Such conduct is an offense against the laws of the United States punishable by fine and imprisonment. It interferes with the due order of proceedings in the administration of justice, and is well calculated to bring them into contempt. I, myself, have not heretofore sat in this case and do not expect to participate in its decision ; I intend in a few days to leave for the East, but I have been consulted by my associate, and have been requested to take part in this side proceeding, for it is of the utmost

importance for the due administration of justice that such misbehavior as the examiner reports should be stopped, and measures be taken which will prevent its recurrence. My associate will comment on the laws of Congress which make the offense a misdemeanor, punishable by fine and imprisonment.

“The marshal of the court will be directed to disarm the defendant whenever she goes before the examiner or into court in any future proceeding, and to appoint an officer to keep strict surveillance over her, in order that she may not carry out her threatened purpose. This order will be entered. The Justice then said that it is to be observed that this block, embracing this building—the court-house—is under the exclusive jurisdiction of the United States. Every offense committed within it is an offense against the United States, and the State has no jurisdiction whatever. This fact seems to have been forgotten by the parties.”

The following is the order then entered as directed by Justice Field :

“Whereas it appears from the report to this court of the Examiner in Chancery in this case appointed to take the depositions of witnesses, that on the 3d day of August, instant, at his office, counsel of the parties appeared, namely, William M. Stewart, Esquire, and Oliver P. Evans, Esquire, for the complainant, and W. B. Tyler, Esquire, for the defendant, and the defendant in person, and that during the examination before said examiner of a witness named Piper, the defendant became excited and threatened the life of the counsel of the complainant present, and exhibited a pistol with a declared intention to carry such threat into effect, thereby obstructing the order of the proceedings, and endeavoring to bring the same into contempt ; and

“Whereas it further appears that said defendant habitually attends before said examiner carrying a pistol,

“*It is ordered*, That the marshal of this court take such measures as may be necessary to disarm the said defendant, and keep her disarmed, and under strict surveillance, while she is attending the examination of witnesses before said examiner, and whenever attending in court, and that a deputy be detailed for that purpose.”

## CHAPTER V.

### DECISION OF THE CASE IN THE FEDERAL COURT.

The taking of the testimony being completed, the cause was set for a hearing on September, 9th. After an argument of thirteen days the cause was submitted on the 29th of September, 1885. On the 26th of December, 1885, the court rendered its decision, that the alleged declaration of marriage and the letters purporting to have been addressed "My Dear Wife" were false and forged, and that the contemporaneous conduct of the parties, and particularly of the defendant, was altogether incompatible with the claim of marriage or the existence of any such declaration or letters.

A decree was ordered accordingly, and the court made the following further order :

"As the case was argued and submitted during the lifetime of the complainant, who has since deceased, the decree will be entered *nunc pro tunc*, as of September 29, 1885, the date of its submission and a day prior to the decease of the complainant."

The opinion of the court was delivered by Judge Deady, of the United States District Court of Oregon, who sat in the case with Judge Sawyer, the circuit judge.

Of the old negress under whose direction the fraudulent marriage contract had been manufactured, and under whose advice and direction the suit in the state court had been brought, the Judge said :

“ Mary E. Pleasant, better known as Mammie Pleasant, is a conspicuous and important figure in this affair ; without her it would probably never have been brought before the public. She appears to be a shrewd old negress of some means.

“ In my judgment this case and the forgeries and perjuries committed in its support had their origin largely in the brain of this scheming, trafficking, crafty old woman.”

He found that the declaration of marriage was forged by the defendant by writing the declaration over a simulated signature, and that her claim to be the wife of the plaintiff was wholly false, and had been put forth by her and her co-conspirators for no other purpose than to despoil the plaintiff of his property. Judge Sawyer also filed an opinion in the case, in which he declared that the weight of the evidence satisfactorily established the forgery and the fraudulent character of the instrument in question.



## CHAPTER VI.

### THE MARRIAGE OF TERRY AND MISS HILL.

Sarah Althea now received a powerful recruit, who enlisted for the war. This was one of her lawyers, David S. Terry, whom she married on the 7th day of January, 1886, twelve days after the decision of the Circuit Court against her, and which he had heard announced, but before a decree had been entered in conformity with the decision. Terry seemed willing to take the chances that the decree of the Superior Court would not be reversed in the Supreme Court of the State. The decision of the federal court he affected to utterly disregard. It was estimated that not less than \$5,000,000 would be Sarah Althea's share of Sharon's estate, in the event of success in her suit. She would be a rich widow if it could be established that she had ever been a wife. She had quarreled with Tyler, her principal attorney, long before, and accused him of failing in his professional duty. If she could escape from the obligations of her contract with him, she would not be compelled to divide with him the hoped-for \$5,000,000.

Although Judge Terry had been Chief Justice of the Supreme Court of California, the crimes of perjury and

forgery and subornation of perjury which had been loudly charged in Judge Sullivan's opinion against the woman, in whose favor he gave judgment, seemed to him but trifles. Strangely enough, neither he nor Sarah Althea ever uttered a word of resentment against him on account of these charges.

The marriage of Terry with this desperate woman in the face of an adverse decision of the Circuit Court, by which jurisdiction was first exercised upon the subject-matter, was notice to all concerned that, by all the methods known to him, he would endeavor to win her cause, which he thus made his own. He took the position that any denial of Sarah Althea's pretense to have been the wife of Sharon was an insult to her, which could only be atoned by the blood of the person who made it. This was the proclamation of a vendetta against all who should attempt to defend the heirs of Mr. Sharon in the possession of that half of their inheritance which he and Sarah Althea had marked for their own. His subsequent course showed that he relied upon the power of intimidation to secure success. He was a man of powerful frame, accustomed all his life to the use of weapons, and known to be always armed with a knife. He had the reputation of being a fighting man. He had decided that Sarah Althea had been the lawful wife of Sharon, and that therefore he had married a virtuous widow.\* He had

not often been crossed in his purpose or been resisted when he had once taken a position. By his marriage he virtually served notice on the judges of the Supreme Court of the State, before whom the appeal was then pending, that he would not tamely submit to be by them proclaimed to be the dupe of the discarded woman of another. It was well understood that he intended to hold them personally responsible to him for any decision that would have that effect. These intentions were said to have been made known to them.

His rule in life, as once stated by himself, was to compel acquiescence in his will by threats of violence, and known readiness to carry his threats into effect. This, he said, would in most cases insure the desired result. He counted on men's reluctance to engage in personal difficulties with him. He believed in the persuasiveness of ruffianism.

Whether he thought his marriage would frighten Judges Sawyer and Deady, who had just rendered their decision in the United States Circuit Court, and cause them either to modify the terms of the decree not yet entered, or deter them from its enforcement, is a matter of uncertainty. He was of the ultra State's-rights school and had great faith in the power of the courts of a State when arrayed against those of the United States. He had always denied the jurisdiction of the latter in the case of Sarah Althea, both as to

the subject-matter and as to the parties. He refused to see any difference between a suit for a divorce and a suit to cancel a forged paper, which, if allowed to pass as genuine, would entitle its holder to another's property. He persisted in denying that Sharon had been a citizen of Nevada during his lifetime, and ignored the determination of this question by the Circuit Court.

But if Judge Terry had counted on the fears of the United States judges of California he had reckoned too boldly, for on the 15th of January, 1886, eight days after his marriage, the decree of the Circuit Court was formally entered. This decree adjudged the alleged marriage contract of August 25, 1880, false, counterfeited, fabricated, and fraudulent, and ordered that it be surrendered to be cancelled and annulled, and be kept in the custody of the clerk, subject to the further order of the court; and Sarah Althea Hill and her representatives were perpetually enjoined from alleging the genuineness or the validity of the instrument, or making use of it in any way to support her claims as wife of the complainant.

The execution of this decree would, of course, put an end to Sarah Althea's claim, the hope of maintaining which was supposed to have been the motive of the marriage. To defeat its execution then became the sole object of Terry's life. This he hoped to do

by antagonizing it with a favorable decision of the Supreme Court of the State, on the appeals pending therein. It has heretofore been stated that the case against Sharon in the Superior Court was removed from the calendar on the 14th day of November, 1885, because of the defendant's death on the previous day. The 11th of February following, upon proper application, the court ordered the substitution of Frederick W. Sharon as executor and sole defendant in the suit in the place of William Sharon, deceased. The motion for a new trial was argued on the 28th of the following May, and held under advisement until the 4th of the following October, when it was denied. From this order of denial an appeal was taken by the defendant.

It must be borne in mind that there were now two appeals in this case to the Supreme Court of the State from the Superior Court. One taken on the 25th of February, 1885, from the judgment of Judge Sullivan, and from his order for alimony and fees, and the other an appeal taken October 4, 1886, from the order denying the new trial in the cause.

On the 31st of January, 1888, the Supreme Court rendered its decision, affirming the judgment of the Superior Court in favor of Sarah Althea, but reversing the order made by Judge Sullivan granting counsel fees, and reducing the allowance for alimony from \$2,500 per month to \$500. Four judges concurred in



this decision, namely, McKinstry, Searles, Patterson, and Temple. Three judges dissented, to wit, Thornton, Sharpstein, and McFarland.

There then remained pending in the same court the appeal from the order granting a new trial. It was reasonable that Terry should expect a favorable decision on this appeal, as soon as it could be reached. This accomplished, he and Sarah Althea thought to enter upon the enjoyment of the great prize for which they had contended with such desperate energy. Terry had always regarded the decree of the Circuit Court as a mere harmless expression of opinion, which there would be no attempt to enforce, and which the state courts would wholly ignore. Whatever force it might finally be given by the Supreme Court of the United States appeared to him a question far in the future, for he supposed he had taken an appeal from the decree. This attempted appeal was found to be without effect, because when ordered the suit had abated by the death of the plaintiff, and no appeal could be taken until the case was revived by order of the court. This order was never applied for. The two years within which an appeal could have been taken expired January 15, 1888. The decree of the Circuit Court had therefore become final at that time.

## CHAPTER VII.

### THE BILL OF REVIVOR.

It was at this stage of the prolonged legal controversy that Justice Field first sat in the case. The executor of the Sharon estate, on the 12th of March, 1888, filed a bill of revivor in the United States Circuit Court. This was a suit to revive the case of Sharon vs. Hill, that its decree might stand in the same condition and plight in which it was at the time of its entry, which, being *nunc pro tunc*, was of the same effect as if the entry had preceded the death of Mr. Sharon, the case having been argued and submitted during his lifetime. The decree directed the surrender and cancellation of the forged marriage certificate, and perpetually enjoined Sarah Althea Hill, and her representatives, from alleging the genuineness or validity of that instrument, or making any use of the same in evidence, or otherwise to support any rights claimed under it.

The necessity for this suit was the fact that the forged paper had not been surrendered for cancellation, as ordered by the decree, and the plaintiff feared that the defendant would claim and seek to enforce property rights as wife of the plaintiff, by authority of the alleged written declaration of marriage, under the

decree of another court, essentially founded thereupon, contrary to the perpetual injunction ordered by the Circuit Court. To this suit, David S. Terry, as husband of the defendant, was made a party. It merely asked the Circuit Court to place its own decree in a position to be executed, and thereby prevent the spoliation of the Sharon estate, under the authority of the decree of Judge Sullivan in the suit in the state court subsequently commenced. A demurrer was filed by the defendant. It was argued in July before Justice Field, Judge Sawyer, and District Judge Sabin. It was overruled on the 3d of September, when the court ordered that the original suit of Sharon against Hill, and the final decree therein, stand revived in the name of Frederick W. Sharon as executor, and that the said suit and the proceedings therein be in the same plight and condition they were in at the death of William Sharon, so as to give the executor, complainant as aforesaid, the full benefit, rights, and protection of the decree, and full power to enforce the same against the defendants, and each of them, at all times and in all places, and in all particulars. The opinion in the case was delivered by Justice Field. During its delivery he was interrupted by Mrs. Terry with violent and abusive language, and an attempt by her to take a pistol from a satchel which she held in her hand. Her removal from the court-room by order of Justice Field;

her husband's assault upon the marshal with a deadly weapon for executing the order, and the imprisonment of both the Terrys for contempt of court, will be more particularly narrated hereafter.

The commencement of the proceedings for the revival of the suit was well calculated to alarm the Terrys. They saw that the decree in the Circuit Court was to be relied upon for something more than its mere moral effect. Their feeling towards Judges Sawyer and Deady was one of most intense hatred. Judge Deady was at his home in Oregon, beyond the reach of physical violence at their hands, but Judge Sawyer was in San Francisco attending to his official duties. Upon him they took an occasion to vent their wrath.

It was on the 14th of August, 1888, after the commencement of the revivor proceedings, but before the decision. Judge Sawyer was returning in the railway train to San Francisco from Los Angeles, where he had been to hold court. Judge Terry and his wife took the same train at Fresno. Judge Sawyer occupied a seat near the center of the sleeping-car, and Judge and Mrs. Terry took the last section of the car, behind him, and on the same side. A few minutes after leaving Fresno, Mrs. Terry walked down the aisle to a point just beyond Judge Sawyer, and turning around with an ugly glare at him, hissed out, in a spiteful and contemptuous tone: "Are you here?" to

which the Judge quietly replied: "Yes, Madam," and bowed. She then resumed her seat. A few minutes after, Judge Terry walked down the aisle about the same distance, looked over into the end section at the front of the car, and finding it vacant, went back, got a small hand-bag, and returned and seated himself in the front section, with his back to the engine and facing Judge Sawyer. Mrs. Terry did not (at the moment) accompany him. A few minutes later she walked rapidly down the passage, and as she passed Judge Sawyer, seized hold of his hair at the back of his head, gave it a spiteful twitch and passed quickly on, before he could fully realize what had occurred. After passing she turned a vicious glance upon him, which was continued for some time after taking her seat by the side of her husband. A passenger heard Mrs. Terry say to her husband: "I will give him a taste of what he will get bye and bye." Judge Terry was heard to remark: "The best thing to do with him would be to take him down the bay and drown him." Upon the arrival of Judge Sawyer at San Francisco, he entered a street car, and was followed by the Terrys. Mrs. Terry took a third seat from him, and seeing him, said: "What, are you in this car too?" When the Terrys left the car Mrs. Terry addressed some remark to Judge Sawyer in a spiteful tone, and repeated it. He said he did not quite catch it, but it was something



like this : "We will meet again. This is not the end of it."

Persons at all familiar with the tricks of those who seek human life, and still contrive to keep out of the clutches of the law, will see in the scene above recited an attempt to provoke an altercation which would have been fatal to Judge Sawyer, if he had resented the indignity put upon him by Mrs. Terry, by even so much as a word. This could easily have been made the pretext for an altercation between the two men, in which the result would not have been doubtful. There could have been no proof that Judge Terry knew of his wife's intention to insult and assault Judge Sawyer as she passed him, nor could it have been proven that he knew she had done so. A remonstrance from Sawyer could easily have been construed by Terry, upon the statement of his wife, into an original, unprovoked, and aggressive affront. It is now, however, certain that the killing of Judge Sawyer was not at that time intended. It may have been, to use Mrs. Terry's words, "to give him a taste of what he would get bye and bye," if he should dare to render the decision in the revivor case adversely to them.

This incident has been here introduced and dwelt upon for the purpose of showing the tactics resorted to by the Terrys during this litigation, and the methods by which they sought to control decisions. It is en-

tirely probable that they had hopes of intimidating the federal judges, as many believed some state judges had been, and that thus they might "from the nettle danger, pluck the flower safety."

We have seen that they reckoned without their host. We shall now see to what extent their rage carried them on the day that the decision was rendered reviving the decree.

## CHAPTER VIII.

### THE TERRYS IMPRISONED FOR CONTEMPT.

On the day after Judge Sawyer's return from Los Angeles he called the marshal to his chambers, and notified him of Mrs. Terry's violent conduct towards him on the train in the presence of her husband, so that he might take such steps as he thought proper to keep order when they came into the court-building, and see that there was no disturbance in the court-room. On the morning of September 3d, the marshal was again summoned to Judge Sawyer's room, where Judge Field was also present. They informed him that the decision in the revival suit would be rendered that day, and they desired him to be present, with a sufficient number of bailiffs to keep order in court. They told him that judging from the action of the Terrys on the train, and the threats they were making so publicly, and which were being constantly published in the newspapers, it was not impossible that they might create a disturbance in the court-room.

When the court opened that day, it found Terry and his wife already seated within the bar, and immediately in front of the judges. As it afterward appeared, they were both on a war-footing, he being armed with a

concealed bowie-knife, and she with a 41-calibre revolver, which she carried in a small hand-bag, five of its chambers being loaded. The judges took their seats on the bench, and very shortly afterward Justice Field, who presided, began reading the opinion of the court in which both of his associates concurred. A printed pamphlet copy of this opinion contains 61 pages, of which 18 are taken up with a statement of the case. The opinion commences at page 19 and covers the remaining 42 pages of the pamphlet.

From time to time, as the reading of the opinion progressed, Mrs. Terry, who was greatly excited, was observed to unclasp and clasp again the fastening of her satchel which contained her pistol, as if to be sure she could do so at any desired moment. At the 11th page of the opinion the following passage occurs :

“The original decree is not self-executing in all its parts ; it may be questioned whether any steps could be taken for its enforcement, until it was revived, but if this were otherwise, the surrender of the alleged marriage contract for cancellation, as ordered, requires affirmative action on the part of the defendant. The relief granted is not complete until such surrender is made. When the decree pronounced the instrument a forgery, not only had the plaintiff the right that it should thus be put out of the way of being used in the future to his embarrassment and the embarrassment of his estate, but public justice required that it should be formally cancelled, that it might constantly bear on its face the evidence of its bad character, whenever or wherever presented or appealed to.”

When Mrs. Terry heard the above words concerning the surrender of the alleged marriage contract for cancellation, she first endeavored for a few seconds, but unsuccessfully, to open the satchel containing her pistol. For some reason the catch refused to yield. Then, rising to her feet, and placing the satchel before her on the table, she addressed the presiding justice, saying :

“Are you going to make me give up my marriage contract ? ”

Justice Field said, “ Be seated, madam.”

She repeated her question :

“Are you going to take the responsibility of ordering me to deliver up that contract ? ”

She was again ordered to resume her seat. At this she commenced raving loudly and violently at the justice in coarse terms, using such phrases as these :

“ Mr. Justice Field, how much have you been bought for ? Everybody knows that you have been bought ; that this is a paid decision.”

“ How big was the sack ? ”

“ How much have you been paid for the decision ? ”

“You have been bought by Newland’s coin ; everybody knows you were sent out here by the Newlands to make this decision.”

“ Every one of you there have been paid for this decision.”



At the commencement of this tirade, and after her refusal to desist when twice ordered to do so, the presiding justice directed the marshal to remove her from the court-room. She said defiantly :

“I will not be removed from the court-room; you dare not remove me from the court-room.”

Judge Terry made no sign of remonstrance with her, had not endeavored to restrain her, but had, on the contrary, been seen to nod approvingly to her, as if assenting to something she had said to him just before she sprang to her feet. The instant, however, the court directed her removal from the room, of which she had thus taken temporary possession, to the total suspension of the court proceedings, his soul was “in arms and eager for the fray.” As the marshal moved toward the offending woman, he rose from his seat, under great excitement, exclaiming, among other things, “No living man shall touch my wife!” or words of that import, and dealt the marshal a violent blow in the face,\* breaking one of his front teeth. He then unbuttoned his coat and thrust his hand under his vest, where his bowie-knife was kept, apparently for the purpose of drawing it, when he was seized by persons present, his hands held from drawing his weapon, and he himself forced down on his back. The marshal,

---

\* One of the witnesses stated that Terry also said, “Get a written order from the court.”



with the assistance of a deputy, then removed Mrs. Terry from the court-room, she struggling, screaming, kicking, striking, and scratching them as she went, and pouring out imprecations upon Judges Field and Sawyer, denouncing them as "corrupt scoundrels," and declaring she would kill them both. She was taken from the room into the main corridor, thence into the marshal's business office, and then into an inner room of his office. She did not cease struggling when she reached that room, but continued her frantic abuse.

While Mrs. Terry was being removed from the court-room Terry was held down by several strong men. He was thus, by force alone, prevented from drawing his knife on the marshal. While thus held he gave vent to coarse and denunciatory language against the officers. When Mrs. Terry was removed from the court-room he was allowed to rise. He at once made a swift rush for the door leading to the corridor on which was the marshal's office. As he was about leaving the room or immediately after stepping out of it, he succeeded in drawing his knife. As he crossed the threshold he brandished the knife above his head, saying, "I am going to my wife." There was a terrified cry from the bystanders: "He has got a knife." His arms were then seized by a deputy marshal and others present, to prevent him from using it, and a desperate struggle ensued. Four persons held on to the arms and body

of Terry, and one presented a pistol to his head, threatening at the same time to shoot him if he did not give up the knife. To these threats Terry paid no attention, but held on to the knife, actually passing it during the struggle from one hand to the other. David Neagle then seized the handle of the knife and commenced drawing it through Terry's hand, when Terry relinquished it.

The whole scene was one of the wildest alarm and confusion. To use the language of one of the witnesses, "Terry's conduct throughout this affair was most violent. He acted like a demon, and all the time while in the corridor he used loud and violent language, which could be plainly heard in the court-room, and, in fact, throughout the building," applying to the officers vile epithets, and threatening to cut their hearts out if they did not let him go to his wife. The knife which Terry drew, and which he afterwards designated as "a small sheath knife," was, including the handle, nine and a quarter inches long, the blade being five inches, having a sharp point, and is commonly called a bowie-knife. He himself afterwards represented that he drew this knife, not "because he wanted to hurt anybody, but because he wanted to force his way into the marshal's office."

The presiding justice had read only a small portion of the opinion of the court when he was interrupted by

the boisterous and violent proceedings described. On their conclusion, by the arrest of the Terrys, he proceeded with the reading of the opinion, which occupied nearly a whole hour. The justices, without adjourning the court, then retired to the adjoining chambers of the presiding justice for deliberation. They there considered of the action which should be taken against the Terrys for their disorderly and contemptuous conduct. After determining what that should be they returned to the court-room and announced it. For their conduct and resistance to the execution of the order of the court both were adjudged guilty of contempt and ordered, as a punishment, to be imprisoned in the county jail, Terry for six months and his wife for thirty days. When Terry heard of the order, and the commitment was read to him, he said, "Judge Field" (applying to him a coarse and vituperative epithet) "thinks when I get out, when I get released from jail, that he will be in Washington, but I will meet him when he comes back next year, and it will not be a very pleasant meeting for him."

Mrs. Terry said that she would kill both Judges Field and Sawyer, and repeated the threat several times. While the prisoners were being taken to jail, Mrs. Terry said to her husband, referring to Judge Sawyer: "I wooled him good on the train coming from Los Angeles. He has never told that." To which he replied: "He will not tell that; that was too good."

She said she could have shot Judge Field and killed him from where she stood in the court-room, but that she was not ready then to kill the old villain; she wanted him to live longer. While crossing the ferry to Oakland she said, "I could have killed Judges Field and Sawyer; I could shoot either one of them, and you would not find a judge or a jury in the State would convict me." She repeated this, and Terry answered, saying: "No, you could not find a jury that would convict any one for killing the old villain," referring to Judge Field.

The jailer at Alameda testified that one day Mrs. Terry showed him the sheath of her husband's knife, saying: "That is the sheath of that big bowie-knife that the Judge drew. Don't you think it is a large knife?" Judge Terry was present, and laughed and said: "Yes; I always carry that," meaning the knife.

To J. H. O'Brien, a well-known citizen, Judge Terry said that "after he got out of jail he would horsewhip Judge Field. He said he did not think he would ever return to California, but this earth was not large enough to keep him from finding Judge Field, and horsewhipping him," and said, "if he resents it I will kill him."

To a newspaper writer, Thomas T. Williams, he said: "Judge Field would not dare to come out to the Pacific Coast, and he would have a settlement with him if he did come."



J. M. Shannon, a friend of Terry's for thirty years, testified that while the Terrys were in jail he called there with Mr. Wigginton, formerly a member of Congress from California; that during the call Mrs. Terry said something to her husband to the effect that they could not do anything at all in regard to it. He said: "Yes, we can." She asked what they could do. He said: "I can kill old Sawyer, damn him. I will kill old Sawyer, and then the President will have to appoint some one in his place." In saying this "he brought his fist down hard and seemed to be mad."

Ex-Congressman Wigginton also testified concerning this visit to Terry. It occurred soon after the commitment. He went to arrange about some case in which he and Terry were counsel on opposite sides. He told Terry of a rumor that there was some old grudge or difference between him and Judge Field. Terry said there was none he knew of. He said:

"When Judge Field's name was mentioned as candidate for President of the United States,—I think he said,—‘when I was a delegate to the convention, it being supposed that I had certain influence with a certain political element, that also had delegates in the convention, some friend or friends’—I will not be sure whether it was friend or friends—‘of Judge Field came to me and asked for my influence with these delegates to secure the nomination for Judge Field. My answer’—I am now stating the language as near as I can of Judge Terry’s—‘my answer was, ‘no, I have no influence with that element.’ I understood it to be the

workingmen's delegates. I could not control these delegates, and if I could would not control them for Field.' He said : 'That may have caused some alienation, but I do not know that Field knew that.' "

Mr. Wigginton said that Mrs. Terry asked her husband what he could do, and he replied, showing more feeling than he had before: "Do? I can kill old Sawyer, and by God, if necessary, I will, and the President will then have to appoint some one else in his place."

## CHAPTER IX.

TERRY'S PETITION TO THE CIRCUIT COURT FOR A RELEASE—  
ITS REFUSAL—HE APPEALS TO THE SUPREME COURT—  
UNANIMOUS DECISION AGAINST HIM THERE—PRESIDENT  
CLEVELAND REFUSES TO PARDON HIM—FALSEHOODS  
REFUTED.

On the 12th of September Terry petitioned the Circuit Court for a revocation of the order of imprisonment in his case, and in support thereof made the following statement under oath :

“That when petitioner's wife, the said Sarah A. Terry, first arose from her seat, and before she uttered a word, your petitioner used every effort in his power to cause her to resume her seat and remain quiet, and he did nothing to encourage her in her acts of indiscretion ; when this court made the order that petitioner's wife be removed from the court-room your petitioner arose from his seat with the intention and purpose of himself removing her from the court-room quietly and peaceably, and that he had no intention or design of obstructing or preventing the execution of said order of the court ; that he never struck or offered to strike the United States marshal until the said marshal had assaulted himself, and had in his presence violently, and as he believed unnecessarily, assaulted the petitioner's wife.

“Your petitioner most solemnly swears that he neither drew nor attempted to draw any deadly weapon of any kind whatever in said court-room, and that he did not

assault or attempt to assault the U. S. marshal with any deadly weapon in said court-room or elsewhere. And in this connection he respectfully represents that after he left said court-room he heard loud talking in one of the rooms of the U. S. marshal, and among the voices proceeding therefrom he recognized that of his wife, and he thereupon attempted to force his way into said room through the main office of the United States marshal; the door of the room was blocked by such a crowd of men that the door could not be closed; that your petitioner then, for the first time, drew from inside his vest a small sheath-knife, at the same time saying to those standing in his way in said door, that he did not want to hurt any one; that all he wanted was to get into the room where his wife was. The crowd then parted and your petitioner entered the doorway, and there saw a United States deputy marshal with a revolver in his hand pointed to the ceiling of the room. Some one then said: 'Let him in if he will give up his knife,' and your petitioner immediately released hold of the knife to some one standing by.

"In none of these transactions did your petitioner have the slightest idea of showing any disrespect to this honorable court or any of the judges thereof.

"That he lost his temper, he respectfully submits was a natural consequence of himself being assaulted when he was making an honest effort to peaceably and quietly enforce the order of the court, so as avoid a scandalous scene, and of his seeing his wife so unnecessarily assaulted in his presence."

It will be observed that Terry, in his petition, contradicts the facts recited in the orders for the commitment of himself and his wife. These orders were made by Justice Field, Circuit Judge Sawyer, and District Judge Sabin from the district of Nevada, who did not

depend upon the testimony of others for information as to the facts in the case, but were, themselves, eye-witnesses and spoke from personal observation and absolute knowledge.

In passing upon Terry's petition, these judges, speaking through Justice Field, who delivered the opinion of the court, bore testimony to a more particular account of the conduct of Terry and his wife than had been given in the order for the commitment. As the scene has already been described at length, this portion of the opinion of the court would be a mere repetition, and is therefore omitted. After reciting the facts, Justice Field referred to the gravity of Terry's offense in the following terms :

“The misbehavior of the defendant, David S. Terry, in the presence of the court, in the court-room, and in the corridor, which was near thereto, and in one of which (and it matters not which) he drew his bowie-knife, and brandished it with threats against the deputy of the marshal and others aiding him, is sufficient of itself to justify the punishment imposed. But, great as this offense was, the forcible resistance offered to the marshal in his attempt to execute the order of the court, and beating him, was a far greater and more serious affair. The resistance and beating was the highest possible indignity to the Government. When the flag of the country is fired upon and insulted, it is not the injury to the bunting, the linen, or silk on which the stars and stripes are stamped which startles and arouses the country. It is the indignity and insult to the emblem of the nation's majesty which stirs every



heart, and makes every patriot eager to resent them. So, the forcible resistance to an officer of the United States in the execution of the process, orders, and judgments of their courts is in like manner an indignity and insult to the power and authority of the Government which can neither be overlooked nor extenuated."

After reviewing Terry's statement, Justice Field said :

"We have read this petition with great surprise at its omissions and misstatements. As to what occurred under our immediate observation, its statements do not accord with the facts as we saw them ; as to what occurred at the further end of the room and in the corridor, its statements are directly opposed to the concurring accounts of the officers of the court and parties present, whose position was such as to preclude error in their observations. According to the sworn statement of the marshal, which accords with our own observations, so far from having struck or assaulted Terry, he had not even laid his hands upon him when the violent blow in the face was received. And it is clearly beyond controversy that Terry never voluntarily surrendered his bowie-knife, and that it was wrenched from him only after a violent struggle.

"We can only account for his misstatement of facts as they were seen by several witnesses, by supposing that he was in such a rage at the time that he lost command of himself, and does not well remember what he then did, or what he then said. Some judgment as to the weight this statement should receive, independently of the incontrovertible facts at variance with it, may be formed from his speaking of the deadly bowie-knife he drew as 'a small sheath-knife,' and of the shameless language and conduct of his wife as 'her acts of indiscretion.'

"No one can believe that he thrust his hand under

his vest where his bowie-knife was carried without intending to draw it. To believe that he placed his right hand there for any other purpose—such as to rest it after the violent fatigue of the blow in the marshal's face or to smooth down his ruffled linen—would be childish credulity.

“But even his own statement admits the assaulting of the marshal, who was endeavoring to enforce the order of the court, and his subsequently drawing a knife to force his way into the room where the marshal had removed his wife. Yet he offers no apology for his conduct; expresses no regret for what he did, and makes no reference to his violent and vituperative language against the judges and officers of the court, while under arrest, which is detailed in the affidavits filed.”

In refusing to grant the petition the court said :

“There is nothing in his petition which would justify any remission of the imprisonment. The law imputes an attempt to accomplish the natural result of one's acts, and when these acts are of a criminal nature it will not accept, against such implication, the denial of the transgressor. No one would be safe if the denial of a wrongful or criminal act would suffice to release the violator of the law from the punishment due his offenses.”

On September 17, 1888, after the announcement of the opinion of the court by Mr. Justice Field denying the petition of D. S. Terry for a revocation of the order committing him for contempt, Mr. Terry made public a correspondence between himself and Judge Solomon Heydenfeldt, which explains itself, and is as follows :

"MY DEAR TERRY:

"The papers which our friend Stanley sends you will explain what we are trying to do. I wish to see Field to-morrow and sound his disposition, and if it seems advisable I will present our petition. But in order to be effective, and perhaps successful, I wish to feel assured and be able to give the assurance that failure to agree will not be followed by any attempt on your part to break the peace either by action or demonstration. I know that you would never compromise me in any such manner, but it will give me the power to make an emphatic assertion to that effect and that ought to help.

"Please answer promptly.

"S. HEYDENFELDT."

The reply of Judge Terry is as follows :

"DEAR HEYDENFELDT :

"Your letter was handed me last evening. I do not expect a favorable result from any application to the Circuit Court, and I have very reluctantly consented that an application be made to Judge Field, who will probably wish to pay me for my refusal to aid his presidential aspirations four years ago. I had a conversation with Garber on Saturday last in which I told him if I was released I would seek no personal satisfaction for what had passed. You may say as emphatically as you wish that I do not contemplate breaking the peace, and that, so far from seeking, I will avoid meeting any of the parties concerned. I will not promise that I will refrain from denouncing the decision or its authors. I believe that the decision was purchased and paid for with coin from the Sharon estate, and I would stay here for ten years before I would say that I did not so believe. If the judges of the Circuit Court would do what is right they would revoke the order imprisoning my wife. She certainly was in contempt

of court, but that great provocation was given by going outside the record to smirch her character ought to be taken into consideration in mitigation of the sentence. Field, when a legislator, thought that no court should be allowed to punish for contempt by imprisonment for a longer period than five days. My wife has already been in prison double that time for words spoken under very great provocation. No matter what the result, I propose to stay here until my wife is dismissed.

“Yours truly,

“D. S. TERRY.”

In the opinion of the court, referred to in the foregoing letter as “smirching the character” of Mrs. Terry, there was nothing said reflecting upon her, except what was contained in quotations from the opinion of Judge Sullivan of the State court in the divorce case of Sharon vs. Hill in her favor. These quotations commenced at page 58 of the pamphlet copy of Justice Field’s opinion, when less than three pages remained to be read. It was at page 29 of the pamphlet that Justice Field was reading when Mrs. Terry interrupted him and was removed from the court-room. After her removal he resumed the reading of the opinion, and only after reading 29 pages, occupying nearly an hour, did he reach the quotations in which Judge Sullivan expressed his own opinion that Mrs. Terry had committed perjury several times in his court. The reading of them could not possibly have furnished her any provocation for her conduct. She had then been re-

moved from the court-room more than an hour. Besides, if they "smirched" her character, why did she submit to them complacently when they were originally uttered from the bench by Judge Sullivan in his opinion rendered in her favor?

Justice Field, in what he was reading that so incensed Mrs. Terry, was simply stating the effect of a decree previously rendered in a case, in the trial of which he had taken no part. He was stating the law as to the rights established by that decree. The efforts then made by Terry, and subsequently by his friends and counsel, to make it appear that his assault upon the marshal and defiance of the court were caused by his righteous indignation at assaults made by Judge Field upon his wife's character were puerile, because based on a falsehood. The best proof of this is the opinion itself.

Judge Terry next applied to the Supreme Court of the United States for a writ of habeas corpus. In that application he declared that on the 12th day of September, 1888, he addressed to the Circuit Court a petition duly verified by his oath, and then stated the petition for release above quoted. Yet in a communication published in the *San Francisco Examiner* of October 22d he solemnly declared that this very petition was not filed by any one on his behalf. After full



argument by the Supreme Court the writ was denied, November 12, 1888, by an unanimous court, Justice Field, of course, not sitting in the case. Justice Harlan delivered the opinion of the Court.

## CHAPTER X.

### PRESIDENT CLEVELAND REFUSES TO PARDON TERRY—FALSE STATEMENTS OF TERRY REFUTED.

Before the petition for habeas corpus was presented to the Supreme Court of the United States, Judge Terry's friends made a strenuous effort to secure his pardon from President Cleveland. The President declined to interfere. In his efforts in that direction Judge Terry made gross misrepresentations as to Judge Field's relations with himself, which were fully refuted by Judge Heydenfelt, the very witness he had invoked. Judge Heydenfelt had been an associate of Judge Terry on the State supreme bench. These representations and their refutation are here given as a necessary element in this narrative.

Five days after he had been imprisoned, to wit, September 8, Terry wrote a letter to his friend Zachariah Montgomery at Washington, then Assistant Attorney-General for the Interior Department under the Cleveland Administration, in which he asked his aid to obtain a pardon from the President. Knowing that it would be useless to ask this upon the record of his conduct as shown by the order for his commitment, he resorted to the desperate expedient of endeavoring to

overcome that record by putting his own oath to a false statement of the facts, against the statement of the three judges, made on their own knowledge, as eye-witnesses, and supported by the affidavits of court officers, lawyers, and spectators.

To Montgomery he wrote :

“I have made a plain statement of the facts which occurred in the court, and upon that propose to ask the intervention of the President, and I request you to see the President ; tell him all you know of me, and what degree of credit should be given to a statement by me upon my own knowledge of the facts. When you read the statement I have made you will be satisfied that the statement in the order of the court is false.”

He then proceeded to tell his story as he told it in his petition to the Circuit Court. His false representations as to the assault he made upon the marshal, and as to his alleged provocation therefor, were puerile in the extreme. He stood alone in his declaration that the marshal first assaulted him, while the three judges and a dozen witnesses declared the very opposite. His denial that he had assaulted the marshal with a deadly weapon was contradicted by the judges and others, who said that they saw him attempt to draw a knife in the court-room, which attempt, followed up as it was continually until successful, constituted an assault with that weapon. To call his bowie-knife “ a small sheath-

knife," and the outrageous conduct of his wife "acts of indiscretion;" to pretend that he lost his temper because he was assaulted "while making an honest effort to peaceably and quietly enforce the order of the court," and finally to pretend that his wife had been "unnecessarily assaulted" in his presence, was all not only false, but simply absurd and ridiculous.

He said: "I don't want to stay in prison six months for an offense of which I am not guilty. There is no way left except to appeal to the President. The record of a court imports absolute verity, so I am not allowed to show that the record of the Circuit Court is absolutely false. If you can help me in this matter you will confer on me the greatest possible favor."

He told Montgomery that it had been suggested to him that one reason for Field's conduct was his refusal to support the latter's aspirations for the Presidency. In this connection he made the following statement:

"In March, 1884, I received a note from my friend Judge Heydenfeldt, saying that he wished to see me on important business, and asking me to call at his office. I did so, and he informed me that he had received a letter from Judge Field, who was confident that if he could get the vote of California in the Democratic National Convention, which would assemble that year, he would be nominated for President and would be elected as, with the influence of his family and their connection, that he would certainly carry New York; that Judge Field further said that a Congressman from California and other of his friends had said that if I

would aid him, I could give him the California delegation; that he understood I wanted official recognition as, because of my duel years ago, I was under a cloud; that if I would aid him, I should have anything I desired."

It will be observed that he here positively states that Judge Heydenfeldt told him he had received a letter from Judge Field, asking Terry's aid and promising, for it, a reward. Judge Heydenfeldt, in a letter dated August 21, 1889, to the *San Francisco Examiner*, branded Terry's assertion as false. The letter to the *Examiner* is as follows:

"The statement made in to-day's *Examiner* in reference to the alleged letter from Justice Field to me, derived, as is stated by Mr. Ashe, from a conversation with Judge Terry, is utterly devoid of truth.

"I had at one time, many years ago, a letter from Justice Field, in which he stated that he was going to devote his leisure to preparing for circulation among his friends his reminiscences, and, referring to those of early California times, he requested me to obtain from Judge Terry his, Terry's, version of the Terry-Broderrick duel, in order that his account of it might be accurate. As soon as I received this letter, I wrote to Judge Terry, informing him of Judge Field's wishes, and recommending him to comply, as coming, as the account would, from friendly hands, it would put him correct upon the record, and would be in a form which would endure as long as necessary for his reputation on that subject.

"I received no answer from Judge Terry, but meeting him, some weeks after, on the street in this city, he



excused himself, saying that he had been very busy, and adding that it was unnecessary for him to furnish a version of the duel, as the published and accepted version was correct.

"The letter to me from Justice Field above referred to is the only letter from Justice Field to me in which Judge Terry's name was ever mentioned, and, with the exception of the above-mentioned street conversation, Judge Field was never the subject of conversation between Judge Terry and myself, from the time I left the bench, on the 1st of January, 1857, up to the time of Terry's death.

"As to the statement that during Terry's trouble with the Sharon case, I offered Terry the use of Field's letter, it results from what I have above stated—that it is a vile falsehood, whoever may be responsible for it.

"I had no such letter, and consequently could have made no such offer.

"San Francisco, August 21, 1889.

"S. HEYDENFELDT."

Judge Heydenfeldt subsequently addressed the following letter to Judge Field :

"SAN FRANCISCO, *August 31, 1889.*

"MY DEAR JUDGE : I received yours of yesterday with the extract from the *Washington Post* of the 22d inst., containing a copy of a letter from the late Judge Terry to the Hon. Zack Montgomery.

"The statement in that letter of a conversation between Terry and myself in reference to you is untrue. The only conversation Terry and I ever had in relation to you was, as heretofore stated, in regard to a request from you to me to get from Terry his version of the Terry-Broderick duel, to be used in your intended reminiscences.

"I do not see how Terry could have made such an erroneous statement, unless, possibly, he deemed that application as an advance made by you towards obtaining his political friendship, and upon that built up a theory, which he moulded into the fancy written by him in the Montgomery letter.

"In all of our correspondence, kept up from time to time since your first removal to Washington down to the present, no letter of yours contained a request to obtain the political support of any one.

"I remain, dear Judge, very truly yours,  
"S. HEYDENFELDT.

"Hon. STEPHEN J. FIELD,  
"Palace Hotel, San Francisco."

At the hearing of the Neagle case, Justice Field was asked if he had been informed of any statements made by Judge Terry of ill feeling existing between them before the latter's imprisonment for contempt. He replied:

"Yes, sir. Since that time I have seen a letter purporting to come from Terry to Zack Montgomery, published in Washington, in which he ascribed my action to personal hostility, because he had not supported me in some political aspiration. There is not one particle of truth in that statement. It is a pure invention. In support of his statement he referred to a letter received or an interview had with Judge Heydenfeldt. There is not the slightest foundation for it, and I cannot understand it, except that the man seems to me to have been all changed in the last few years, and he did not hesitate to assert that the official actions of others were governed by improper considerations. I saw charges made by him against judges of the State courts; that

they had been corrupt in their decisions against him ; that they had been bought. That was the common assertion made by him when decisions were rendered against him."

He then referred to the above letters of Judge Heydenfeldt, declaring Terry's assertion to be false.

It should be borne in mind that Terry's letter to Montgomery was written September 8th. It directly contradicts what he had said to ex-Congressman Wigginton on the 5th or 6th of the same month. To that gentleman he declared that he knew of no " old grudge or little difference " between himself and Judge Field. He said he had declined to support the latter for the Presidency, and added : " That may have caused some alienation, but I do not know that Judge Field knew that."

In his insane rage Terry did not realize how absurd it was to expect people to believe that Judge Sawyer and Judge Sabin, both Republicans, had participated in putting him in jail, to punish him for not having supported Justice Field for the Presidency in a National Democratic Convention years before.

Perhaps Terry thought his reference to the fact that Judge Field's name had been previously used in Democratic Conventions, in connection with the Presidency, might have some effect upon President Cleveland's mind.

This letter was not forwarded to Zachariah Montgomery until a week after it was written. He then stated in a postscript that he had delayed sending it upon the advice of his attorneys pending the application to the Circuit Court for his release. Again he charged that the judges had made a false record against him, and that evidence would be presented to the President to show it.

Terry and his friends brought all the pressure to bear that they could command, but the President refused his petition for a pardon, and, as already shown, the Supreme Court unanimously decided that his imprisonment for contempt had been lawfully ordered. He was therefore obliged to serve out his time.

Mrs. Terry served her thirty days in jail, and was released on the 3d of October.

There is a federal statute that provides for the reduction of a term of imprisonment of criminals for good behavior. Judge Terry sought to have this statute applied in his case, but without success. The Circuit Court held that the law relates to state penitentiaries, and not to jails, and that the system of credits could not be applied to prisoners in jail. Besides this, the credits in any case are counted by the year, and not by days or months. The law specifies that prisoners in state prisons are entitled to so many

months' time for the first year, and so many for each subsequent year. As Terry's sentence ran for six months, the court said the law could not apply. He consequently remained in jail until the 3d of March, 1889.



## CHAPTER XI.

### TERRY'S CONTINUED THREATS TO KILL JUSTICE FIELD— RETURN OF THE LATTER TO CALIFORNIA IN 1889.

Justice Field left California for Washington in September, 1888, a few days after the denial of Terry's petition to the Circuit Court for a release. The threats against his life and that of Judge Sawyer so boldly made by the Terrys were as well known as the newspaper press could make them. In addition to this source of information, reports came from many other directions, telling of the rage of the Terrys and their murderous intentions. From October, 1888, till his departure for California, in June following, 1889, his mail almost every day contained reports of what they were saying, and the warnings and entreaties of his friends against his return to that State. These threats came to the knowledge of the Attorney-General of the United States, who gave directions to the marshal of the northern district of California to see to it that Justice Field and Judge Sawyer should be protected from personal violence at the hands of these parties.

Justice Field made but one answer to all who advised against his going to hold court in California in 1889, and that was, "I cannot and will not allow

threats of personal violence to deter me from the regular performance of my judicial duties at the times and places fixed by law. As a judge of the highest court of the country, I should be ashamed to look any man in the face if I allowed a ruffian, by threats against my person, to keep me from holding the regular courts in my circuit."

Terry's murderous intentions became a matter of public notoriety, and members of Congress and Senators from the Pacific Coast, in interviews with the Attorney-General, confirmed the information derived by him from other sources of the peril to which the United States judges in California were subjected. He, in consequence, addressed the following letter on the subject to Marshal Franks:

"DEPARTMENT OF JUSTICE,  
"WASHINGTON, *April 27, 1889.*

"JOHN C. FRANKS,

*"United States Marshal, San Francisco, Cal.*

"SIR: The proceedings which have heretofore been had in the case of Mr. and Mrs. Terry in your United States Circuit Court have become matter of public notoriety, and I deem it my duty to call your attention to the propriety of exercising unusual precaution, in case further proceedings shall be had in that case, for the protection of His Honor Justice Field, or whoever may be called upon to hear and determine the matter. Of course, I do not know what may be the feelings or purpose of Mr. and Mrs. Terry in the premises, but many things which have happened indicate that violence on

their part is not impossible. It is due to the dignity and independence of the court and the character of its judges that no effort on the part of the Government shall be spared to make them feel entirely safe and free from anxiety in the discharge of their high duties.

"You will understand, of course, that this letter is not for the public, but to put you upon your guard. It will be proper for you to show it to the District Attorney if deemed best.

"Yours truly,

"W. H. H. MILLER,

*"Attorney-General."*

A month later the Attorney-General authorized the employment of special deputies for the purpose named in the foregoing letter.

## CHAPTER XII.

FURTHER PROCEEDINGS IN THE STATE COURT.—JUDGE SULLIVAN'S DECISION REVERSED.

Mrs. Terry did not wait for the release of her husband from jail before renewing the battle. On the 22d of January, 1889, she gave notice of a motion in the Superior Court for the appointment of a receiver who should take charge of the Sharon estate, which she alleged was being squandered to the injury of her interest therein acquired under the judgment of Judge Sullivan. On the 29th of January an injunction was issued by the United States Circuit Court commanding her and all others to desist from this proceeding. The Terrys seemed to feel confident that this would bring on a final trial of strength between the federal and state courts, and that the state court would prevail in enforcing its judgment and orders.

The motion for a receiver was submitted after full argument, and on the 3d of June following Judge Sullivan rendered a decision asserting the jurisdiction of his court to entertain the motion for a receiver, and declaring the decree of the United States Circuit Court inoperative. In his opinion Judge Sullivan reviewed the opinion of Justice Field in the revivor suit, taking

issue therewith. As that decision had been affirmed by the Supreme Court of the United States nearly a month before, to wit, on the 13th of May, 1889, it was rather late for such a discussion. Having thus decided, however, that the motion for a receiver could be made, he set the hearing of the same for July 15, 1889.

On the 27th of May, one week before the rendering of this decision by Judge Sullivan, the mandate of the United States Supreme Court had been filed in the Circuit Court at San Francisco, by which the decree of that court was affirmed. Whether a receiver would be appointed by Judge Sullivan, in the face of the decision of the Supreme Court of the United States, became now an interesting question. Terry and his lawyers affected to hold in contempt the Supreme Court decree, and seemed to think no serious attempt would be made to enforce it.

Meantime, both of the Terrys had been indicted in the United States Circuit Court for the several offenses committed by them in assaulting the marshal in the court-room as hereinbefore described. These indictments were filed on the 20th of September. Dilatory motions were granted from time to time, and it was not until the 4th of June that demurrers to the indictments were filed. The summer vacation followed without any argument of these demurrers. It was



during this vacation that Justice Field arrived in California, on the 20th of June. The situation then existing was as follows :

The criminal proceedings against the Terrys were at a standstill, having been allowed to drag along for nine months, with no further progress than the filing of demurrers to the indictments.

The appeal to the Supreme Court of the State from Judge Sullivan's order denying a new trial had been argued and submitted on the 4th of May, but no decision had been rendered.

Despite the pendency of that appeal, by reason of which the judgment of the Supreme Court of the State had not yet become final, and despite the mandate of the United States Supreme Court affirming the decree in the revivor case, Judge Sullivan had, as we have already seen, set the 15th of July for the hearing of the motion of the Terrys for the appointment of a receiver to take charge of the Sharon estate. For them to proceed with this motion would be a contempt of the United States Circuit Court.

The arrival of Justice Field should have instructed Judge Terry that the decree of that court could not be defied with impunity, and that the injunction issued in it against further proceedings upon the judgment in the state court would be enforced with all the power authorized by the Constitution and laws of the United States for the enforcement of judicial process.

As the 15th of July approached, the lawyers who had been associated with Terry commenced discussing among themselves what would be the probable consequence to them of disobeying an injunction of the United States Circuit Court. The attorneys for the Sharon estate made known their determination to apply to that Court for the enforcement of its writ in their behalf. The Terrys' experience in resisting the authority of that court served as a warning for their attorneys.

On the morning of the 15th of July Judge Terry and his wife appeared, as usual, in the Superior Court room. Two of their lawyers came in, remained a few minutes and retired. Judge Terry himself remained silent. His wife arose and addressed the court, saying that her lawyers were afraid to appear for her. She said they feared if they should make a motion in her behalf, for the appointment of a receiver, Judge Field would put them in jail; therefore, she said, she appeared for herself. She said if she got in jail she would rather have her husband outside, and this was why she made the motion herself, while he remained a spectator.

The hearing was postponed for several days. Before the appointed day therefor, the Supreme Court of the State, on the 17th of July, rendered its decision, reversing the order of Judge Sullivan refusing a new

trial, thereby obliterating the judgment in favor of Sarah Althea, and the previous decision of the appellate court affirming it. The court held that this previous judgment had not become the law of the case pending the appeal from the order denying a new trial. It held that where two appeals are taken in the same case, one from the judgment and the other from the order denying a new trial, the whole case must be held to be under the control of the Supreme Court until the whole is disposed of, and the case remanded for further proceedings in the court below. The court reversed its previous decision, and declared that if the statements made by Sarah Althea and by her witnesses had been true, she never had been the wife of William Sharon, for the reason that, after the date of the alleged contract of marriage, the parties held themselves out to the public as single and unmarried people, and that even according to the findings of fact by Judge Sullivan the parties had not assumed marital rights, duties, and obligations. The case was therefore remanded to the Superior Court for a new trial.

On the 2d of August the demurrers to the several indictments against the Terrys came up to be heard in the United States District Court. The argument upon them concluded on the 5th. On the 7th the demurrer to one of the indictments against Sarah Althea was overruled and she entered a plea of not guilty. No



decision was rendered at that time upon either of the five other indictments.

On the following day, August 8th, Justice Field left San Francisco and went to Los Angeles for the purpose of holding court.

## CHAPTER XIII.

### ATTEMPTED ASSASSINATION OF JUSTICE FIELD, RESULTING IN TERRY'S OWN DEATH AT THE HANDS OF A DEPUTY UNITED STATES MARSHAL.

In view of what was so soon to occur, it is important to understand the condition of mind into which Judge Terry and his wife had now wrought themselves. They had been married about two years and a half. In their desperate struggle for a share of a rich man's estate they had made themselves the terror of the community. Armed at all times and ready for mortal combat with whoever opposed their claims, they seemed, up to the 17th of July, to have won their way in the State courts by intimidation. The decision of the United States Circuit Court was rendered before they were married. It proclaimed the pretended marriage agreement a forgery, and ordered it to be delivered to the clerk of the court for cancellation. Terry's marriage with Sarah Althea, twelve days after this, was a declaration of intention to resist its authority.

The conduct of the pair in the Circuit Court on the 3d of September must have had some object. They may have thought to break up the session of the court for that day, and to so intimidate the judges that they would not carry out their purpose of rendering the



decision ; or they may have hoped that, if rendered, it would be allowed to slumber without any attempt to enforce it ; or even that a rehearing might be granted, and a favorable decision forced from the court. It takes a brave man on the bench to stand firmly for his convictions in the face of such tactics as were adopted by the Terrys. The scene was expected also to have its effect upon the minds of the judges of the Supreme Court of the State, who then were yet to pass finally upon Sullivan's judgment on the appeal from the order denying a new trial.

But the Terrys had not looked sufficiently at the possible consequence of their actions. They had thus far gone unresisted. As District Attorney Carey wrote to the Attorney-General :

“They were unable to appreciate that an officer should perform his official duty when that duty in any way requires that his efforts be directed against them.”

When, therefore, Justice Field directed the removal of Mrs. Terry from the court, and when her doughty defendant and champion, confident of being able to defeat the order, found himself vanquished in the encounter, disarmed, arrested, and finally imprisoned, his rage was boundless. He had found a tribunal which cared nothing for his threats, and was able to overcome his violence. A court that would put him in the

Alameda jail for six months for resisting its order would enforce all its decrees with equal certainty.

From the time of the Terrys' incarceration in the Alameda county jail their threats against Justice Field became a matter of such notoriety that the drift of discussion was not so much whether they would murder the Justice, as to when and under what circumstances they would be likely to do so.

There is little doubt that Terry made many threats for the express purpose of having them reach the knowledge of Judge Field at Washington, in the hope and belief that they would deter him from going to California. He probably thought that the Judge would prefer to avoid a violent conflict, and that if his absence could be assured it might result in allowing the decree of the United States Circuit Court to remain a dead letter.

He told many people that Justice Field would not dare come out to the Pacific Coast. He got the idea into his mind, or pretended to, that Justice Field had put him in jail in order to be able to leave for Washington before a meeting could be had with him. Terry would of course have preferred Field's absence and a successful execution of Sullivan's judgment to his presence in the State and the enforcement of the federal decree.

When the announcement was made that Justice

Field had left Washington for San Francisco, public and private discussions were actively engaged in, as to where he would be likely to encounter danger. A special deputy was sent by the marshal to meet the overland train on which he was travelling, at Reno, in Nevada. The methods of Mrs. Terry defied all calculations. She was as likely to make her appearance, with her burly husband as an escort, at the State line, as she finally did at the breakfast table at Lathrop. Justice Field reached his quarters in San Francisco on the 20th of June. From that day until the 14th of August public discussion of what the Terrys would do continued. Some of the newspapers seemed bent upon provoking a conflict, and inquired with devilish mischief when Terry was going to carry out his threatened purpose.

The threats of the Terrys and the rumors of their intended assault upon Justice Field were reported to him and he was advised to go armed against such assault, which would be aimed against his life. He answered: "No, sir! I will not carry arms, for when it is known that the judges of our courts are compelled to arm themselves against assaults in consequence of their judicial action it will be time to dissolve the courts, consider government a failure, and let society lapse into barbarism."

As the time approached for the hearing of the

motion for a receiver before Judge Sullivan, July 15th, grave apprehensions were entertained of serious trouble. Great impatience was expressed with the Supreme Court of the State for not rendering its decision upon the appeal from the order denying a new trial. It was hoped that the previous decision might be reversed, and a conflict between the two jurisdictions thus avoided. When the decision came, on the 17th of July, there seemed to be some relaxation of the great tension in the public mind. With the Supreme Court of the State, as well as the Supreme Court of the United States, squarely on the record against Mrs. Terry's pretensions to have been the wife of William Sharon, it was hoped that the long war had ended.

When Justice Field left San Francisco for Los Angeles he had no apprehensions of danger, and strenuously objected to being accompanied by the deputy marshal. Some of his friends were less confident. They realized better than he did the bitterness that dwelt in the hearts of Terry and his wife, intensified as it was by the realization of the dismal fact that their last hope had expired with the decision of the Supreme Court of the State. The marshal was impressed with the danger that would attend Justice Field's journey to and from the court at Los Angeles.

He went from San Francisco on the 8th of August.

After holding court in Los Angeles he took the train for San Francisco August 13th, the deputy marshal occupying a section in the sleeping car directly opposite to his. Judge Terry and his wife left San Francisco for their home in Fresno the day following Justice Field's departure for Los Angeles. Fresno is a station on the Southern Pacific between Los Angeles and San Francisco. His train left Los Angeles for San Francisco at 1.30 Tuesday afternoon, August 13th. The deputy marshal got out at all the stations at which any stop was made for any length of time, to observe who got on board. Before retiring he asked the porter of the car to be sure and wake him in time for him to get dressed before they reached Fresno. At Fresno, where they arrived during the night, he got off the train and went out on the platform. Among the passengers who took the train at that station were Judge Terry and wife. He immediately returned to the sleeper and informed Justice Field, who had been awakened by the stopping of the train, that Terry and his wife had got on the train. He replied: "Very well. I hope that they will have a good sleep."

Neagle slept no more that night. The train reached Merced, an intervening station between Fresno and Lathrop, at 5.30 that morning. Neagle there conferred with the conductor, on the platform, and referred to



the threats so often made by the Terrys. He told him that Justice Field was on the train, and that he was accompanying him. He requested him to telegraph to Lathrop, to the constable usually in attendance there, to be at hand, and that if any trouble occurred he would assist in preventing violence.

Justice Field got up before the train reached Lathrop, and told the deputy marshal that he was going to take his breakfast in the dining-room at that place. The following is his statement of what took place :

“He said to me, ‘Judge, you can get a good breakfast at the buffet on board.’ I did not think at the time what he was driving at, though I am now satisfied that he wanted me to take breakfast on the car and not get off. I said I prefer to have my breakfast at this station. I think I said I had come down from the Yosemite Valley a few days before, and got a good breakfast there, and was going there for that purpose.

“He replied : ‘I will go with you.’ We were among the first to get off from the train.”

As soon as the train arrived, Justice Field, leaning on the arm of Neagle, because of his lameness, proceeded to the dining-room, where they took seats for breakfast.

There were in this dining-room fifteen tables, each one of which was ten feet long and four feet wide.

They were arranged in three rows of five each, the tables running lengthwise with each other, with spaces between them of four feet. The aisles between the two rows were about seven feet apart, the rows running north and south.

Justice Field and Neagle were seated on the west side of the middle table in the middle row, the Justice being nearer the lower corner of the table, and Neagle at his left. Very soon after—Justice Field says “a few minutes,” while Neagle says “it may be a minute or so”—Judge Terry and his wife entered the dining-room from the east. They walked up the aisle, between the east and middle rows of tables, so that Justice Field and Neagle were faced towards them. Judge Terry preceded his wife. Justice Field saw them and called Neagle’s attention to them. He had already seen them.

As soon as Mrs. Terry had reached a point nearly in front of Justice Field, she turned suddenly around, and scowling viciously, went in great haste out of the door at which she had come in. This was for the purpose, as it afterwards appeared, of getting her satchel with the pistol in it, which she had left in the car. Judge Terry apparently paid no attention to this movement, but proceeded to the next table above and seated himself at the upper end of it, facing the table at which Justice Field was seated. Thus there were between

the two men as they sat at the tables a distance equal to two table-lengths and one space of four feet, making about twenty-four feet. Terry had been seated but a very short time—Justice Field thought it a moment or two, Neagle thought it three or four minutes—when he arose and moved down towards the door, this time walking through the aisle *behind* Justice Field, instead of the one in front of him as before. Justice Field supposed, when he arose, that he was going out to meet his wife, as she had not returned, and went on with his breakfast; but when Terry had reached a point behind him, and a little to the right, within two or three feet of him, he halted. Justice Field was not aware of this, nor did he know that Terry had stopped, until he was struck by him a violent blow in the face from behind, followed instantaneously by another blow at the back of his head. Neagle had seen Terry stop and turn. Between this and Terry's assault there was a pause of four or five seconds. Instantaneously upon Terry's dealing a blow, Neagle leaped from his chair and interposed his diminutive form between Justice Field and the enraged and powerful man, who now sought to execute his long-announced and murderous purpose. Terry gave Justice Field no warning of his presence except a blow from behind with his right hand.

As Neagle rose, he shouted: "Stop, stop, I am an officer." Judge Terry had drawn back his right arm

for a third blow at Justice Field, and with clinched fist was about to strike, when his attention was thus arrested by Neagle, and looking at him he evidently recognized in him the man who had drawn the knife from his hand in the corridor before the marshal's office on the third of September of the preceding year, while he was attempting to cut his way into the marshal's office. Neagle put his right hand up as he ordered Terry to stop, when Terry carried his right hand at once to his breast, evidently to seize the knife which he had told the Alameda county jailer he "always carried." Says Neagle :

"This hand came right to his breast. It went a good deal quicker than I can explain it. He continued looking at me in a desperate manner and his hand got there."

The expression of Terry's face at that time was described by Neagle in these words :

"The most desperate expression that I ever saw on a man's face, and I have seen a good many in my time. It meant life or death to me or him."

Having thus for a moment diverted the blow aimed at Justice Field and engaged Terry himself, Neagle did not wait to be butchered with the latter's ready knife, which he was now attempting to draw, but raised his six-shooter with his left hand (he is left-handed) and

holding the barrel of it with his right hand, to prevent the pistol from being knocked out of his hands, he shot twice; the first shot into Terry's body and the second at his head. Terry immediately commenced sinking very slowly. Knowing by experience that men mortally wounded have been often known to kill those with whom they were engaged in such an encounter, Neagle fired the second shot to defend himself and Justice Field against such a possibility.

The following is an extract from Justice Field's testimony, commencing at the point where Judge Terry rose from his seat at the breakfast table :

"I supposed, at the time, he was going out to meet his wife, as she had not returned, so I went on with my breakfast. It seems, however, that he came around back of me. I did not see him, and he struck me a violent blow in the face, followed instantaneously by another blow. Coming so immediately together, the two blows seemed like one assault. I heard 'Stop, stop,' cried by Neagle. Of course I was for a moment dazed by the blows. I turned my head around and saw that great form of Terry's with his arm raised and fist clinched to strike me. I felt that a terrific blow was coming, and his arm was descending in a curved way as though to strike the side of my temple, when I heard Neagle cry out: 'Stop, stop, I am an officer.' Instantly two shots followed. I can only explain the second shot from the fact that he did not fall instantly. I did not get up from my seat, although it is proper for me to say that a friend of mine thinks I did, but I did not. I looked around and saw Terry on the floor. I looked at him and saw that particular movement of the



eyes that indicates the presence of death. Of course it was a great shock to me. It is impossible for any one to see a man in the full vigor of life, with all those faculties that constitute life instantly extinguished without being affected, and I was. I looked at him for a moment, then went around and looked at him again, and passed on. Great excitement followed. A gentleman came to me, whom I did not know, but I think it was Mr. Lidgerwood, who has been examined as a witness in this case, and said: 'What is this?' I said: 'I am a Justice of the Supreme Court of the United States. My name is Judge Field. Judge Terry threatened my life and attacked me, and the deputy marshal has shot him.' The deputy marshal was perfectly cool and collected, and stated: 'I am a deputy marshal, and I have shot him to protect the life of Judge Field.' I cannot give you the exact words, but I give them to you as near as I can remember them. A few moments afterwards the deputy marshal said to me: 'Judge, I think you had better go to the car.' I said, 'Very well.' Then this gentleman, Mr. Lidgerwood, said: 'I think you had better.' And with the two I went to the car. I asked Mr. Lidgerwood to go back and get my hat and cane, which he did. The marshal went with me, remained some time, and then left his seat in the car, and, as I thought, went back to the dining-room. (This is, however, I am told, a mistake, and that he only went to the end of the car.) He returned, and either he or some one else stated that there was great excitement; that Mrs. Terry was calling for some violent proceedings. I must say here that, dreadful as it is to take life, it was only a question of seconds whether my life or Judge Terry's life should be taken. I am firmly convinced that had the marshal delayed two seconds both he and myself would have been the victims of Terry.

"In answer to a question whether he had a pistol or other weapon on the occasion of the homicide,

Justice Field replied : 'No, sir. I have never had on my person or used a weapon since I went on the bench of the Supreme Court of this State, on the 13th of October, 1857, except once, when, years ago, I rode over the Sierra Nevada mountains in a buggy with General Hutchinson, and at that time I took a pistol with me for protection in the mountains. With that exception, I have not had on my person, or used, any pistol or other deadly weapon.'"

Judge Terry had fallen very near the place where he first stopped, near the seat occupied by Justice Field at the table.

Neagle testified that if Justice Field had had a weapon, and been active in using it, he was at such a disadvantage, seated as he was, with Terry standing over him, that he would have been unable to raise his hand in his own defense.

A large number of witnesses were examined, all of whom agreed upon the main facts as above stated. Some of them distinctly heard the blows administered by Terry upon Justice Field's face and head. All testified to the loud warning given Terry by Neagle that he was an officer of the law, accompanied by his command that Terry should desist. It was all the work of a few seconds. Terry's sudden attack, the quick progress of which, from the first blow, was neither arrested nor slackened until he was disabled by the bullet from Neagle's pistol, could have been dealt with in no other way. It was evidently a ques-

tion of the instant whether Terry's knife or Neagle's pistol should prevail. Says Neagle :

“ He never took his eyes off me after he looked at me, or I mine off him. I did not hear him say anything. The only thing was he looked like an infuriated giant to me. I believed if I waited two seconds I should have been cut to pieces. I was within four feet of him.”

Q. “ What did the motion that Judge Terry made with his right hand indicate to you? ”

A. “ That he would have had that knife out there within another second and a half, and trying to cut my head off.”

Terry, in action at such a time, from all accounts, was more like an enraged wild animal than a human being. The supreme moment had arrived to which he had been looking forward for nearly a year, when the life of the man he hated was in his hands. He had repeatedly sworn to take it. Not privately had he made these threats. With an insolence and an audacity born of lawlessness and of a belief that he could hew his way with a bowie-knife in courts as well as on the streets, he had publicly sentenced Judge Field to death as a penalty for vindicating the majesty of the law in his imprisonment for contempt.

It would have been the wildest folly that can be conceived of for the murderous assault of such a man to have been met with mild persuasion, or an attempt to arrest him. As well order a hungry tiger to desist

from springing at his prey, to sheathe his outstretched claws and suffer himself to be bound, as to have met Terry with anything less than the force to which he was himself appealing. Every man who knows anything of the mode of life and of quarrelling and fighting among the men of Terry's class knows full well that when they strike a blow they mean to follow it up to the death, and they mean to take no chances. The only way to prevent the execution of Terry's revengeful and openly avowed purpose was by killing him on the spot. Only a lunatic or an imbecile or an accomplice would have pursued any other course in Neagle's place than the one he pursued, always supposing he had Neagle's nerve and cool self-possession to guide him in such a crisis.

While this tragedy was being enacted Mrs. Terry was absent, having returned to the car for the satchel containing her pistol. Before she returned, the shot had been fired that defeated the conspiracy between her and her husband against the life of a judge for the performance of his official duties. She returned to the hotel with her satchel in her hand just as her husband met his death. The manager of the hotel stopped her at the door she was entering, and seized her satchel. She did not relinquish it, but both struggled for its possession. A witness testified that she screamed out while so struggling: "Let me get at

it ; I will fix him." Many witnesses testified to her frantic endeavor to get the pistol. She called upon the crowd to hang the man that killed Judge Terry, and cried out, "Lynch Judge Field." Again and again she made frantic appeals to those present to lynch Judge Field. She tried to enter the car where he was, but was not permitted to do so. She cried out, "If I had my pistol I would fix him."

The testimony subsequently taken left no room to doubt that Terry had his deadly knife in its place in his breast at the time he made the attack on Justice Field. As the crowd were all engaged in breakfasting, his movements attracted little attention, and his motion toward his breast for the knife escaped the notice of all but Neagle and one other witness. Neagle rushed between Terry and Justice Field, and the latter had not a complete view of his assailant at the moment when the blow intended for him was changed into a movement for the knife with which Judge Terry intended to dispose of the alert little man, with whom he had had a former experience, and who now stood between him and the object of his greater wrath.

But the conduct of Mrs. Terry immediately after the homicide was proof enough that her husband's knife had been in readiness. The conductor of the train swore that he saw her lying over the body of her husband about a minute, and when she rose up she



unbuttoned his vest and said: "You may search him; he has got no weapon on him." Not a word had been said about his having had a weapon. No one had made a movement towards searching him, as ought to have been done; but this woman, who had been to the car for her pistol and returned with it to join, if necessary, in the murderous work, had all the time and opportunity necessary for taking the knife from its resting-place under his vest, smearing one of her hands with his blood, which plainly showed where it had been and what she had been doing. Neagle could not search the body, for his whole attention was directed to the protection of Justice Field. Mrs. Terry repeated the challenge to search the body for the knife after it had been removed. This showed clearly that the idea uppermost in her mind was to then and there manufacture testimony that he had not been armed at all. Her eagerness on this subject betrayed her. Had she herself then been searched, after rising from Terry's body, the knife would doubtless have been found concealed upon her person. A number of witnesses testified to her conduct as above described. She said also: "You will find that he has no arms, for I took them from him in the car, and I said to him that I did not want him to shoot Justice Field, but I did not object to a fist bout."

This reference to a fist bout was, of course, an

admission that they had premeditated the assault. It was Judge Terry's knife and not a pistol that Judge Field had to fear. Terry's threats had always pointed to some gross indignity that he would put upon Justice Field, and then kill him if he resented or resisted it. One of his threats was that he would horsewhip Judge Field, and that if he resented it he would kill him. In short, his intentions seem to have been to commit an assassination in alleged self-defense.

The train soon left the station for San Francisco. A constable of Lathrop had taken the train, and addressing Neagle told him that he would have to arrest him. This officer had no warrant and did not himself witness the homicide. Justice Field told him that he ought to have a warrant before making the arrest, remarking, if a man should shoot another when he was about to commit a felony, such as setting fire to your house, you would not arrest him for a murder; or if a highwayman got on the train to plunder. The officer replied very courteously by the suggestion that there would have to be an inquest. Neagle at once said, "I am ready to go," thinking it better to avoid all controversy, and being perfectly willing to answer anywhere for what he had done. Arriving at the next station (Tracy), Neagle and the officer took a buggy and went to the county jail at Stockton. Thus was a deputy marshal of the United States withdrawn from the

service of his Government while engaged in a most important and as yet unfinished duty because he had with rigid faithfulness performed that duty. He was arrested by an officer who had no warrant and had not witnessed the homicide, and lodged in jail.

Meanwhile a detective in San Francisco received a telegram from the sheriff of San Joaquin county to arrest Judge Field. Supposing it to be his duty to comply with this command, the detective crossed the bay to meet the train for that purpose. Marshal Franks said to him : " You shall not arrest him. You have no right to do so. It would be an outrage, and if you attempt it I will arrest you."

The news of these exciting events produced an intense excitement in San Francisco. Upon his arrival at this place, under the escort of the marshal and many friends, Justice Field repaired to his quarters in the Palace Hotel.

## CHAPTER XIV.

### SARAH ALTHEA TERRY CHARGES JUSTICE FIELD AND DEPUTY MARSHAL NEAGLE WITH MURDER.

The body of Judge Terry was taken from Lathrop to Stockton, accompanied by his wife, soon after his death. On that very evening Sarah Althea Terry swore to a complaint before a justice of the peace named Swain, charging Justice Field and Deputy Marshal Neagle with murder. After the investigation before the coroner Assistant District Attorney Gibson stated that the charge against Justice Field would be dismissed, as there was no evidence whatever to connect him with the killing.

Mrs. Terry did not see the shooting and was not in the hotel at the time of the homicide. Having, therefore, no knowledge upon which to base her statement, her affidavit was entitled to no greater consideration than if it had stated that it was made solely upon her belief without any positive information on the subject.

Only the most violent of Terry's friends favored the wanton indignity upon Justice Field, and his arrest, but they had sufficient influence with the district attorney, Mr. White, a young and inexperienced lawyer, to carry him along with them. The justice of the peace

before whom Sarah Althea had laid the information issued a warrant on the following day for the arrest both of Justice Field and Neagle. From this time this magistrate and the district attorney appeared to act under orders from Mrs. Terry.

The preliminary examination was set for Wednesday of the following week, during which time the district attorney stated for publication that Justice Field would have to go to jail and stay there during the six intervening days. It was obvious to all rational minds that Mrs. Terry's purpose was to use the machinery of the magistrate's court for the purpose of taking Judge Field to Stockton, where she could execute her threats of killing him or having him killed ; and if she should fail to do so, or postpone it, then to have the satisfaction of placing a justice of the Supreme Court of the United States in a prisoner's cell, and hold him there for six days awaiting an examination, that being the extreme length of time that he could be so held under the statute. The district attorney was asked if he had realized the danger of bringing Justice Field to Stockton, where he might come in contact with Mrs. Terry. The officer replied :

“ We had intended that if Justice Field were brought here, Mrs. Terry would be placed under the care of *her friends*, and that all precautions to prevent any difficulty that was in the power of the district attorney



would be taken." That was to say, Mrs. Terry would do no violence to Justice Field unless "her friends" permitted her to do so. As some of them were possessed of the same murderous feelings towards Justice Field as those named here, the whole transaction had the appearance of a conspiracy to murder him.

No magistrate can lawfully issue a warrant without sufficient evidence before him to show probable cause. It was a gross abuse of power and an arbitrary and lawless act to heed the oath of this frenzied woman, who notoriously had not witnessed the shooting, and had, but a few hours before, angrily insisted upon having her own pistol returned to her that she, herself, might kill Justice Field. It was beyond belief that the magistrate believed that there was probable cause, or the slightest appearance of a cause, upon which to base the issue of the warrant.

Neagle was brought into court at Stockton at 10 o'clock on the morning after the shooting, to wit, on Thursday, the 15th, and his preliminary examination set for Wednesday, the 21st. Bail could not be given prior to that examination. This examination could have proceeded at once, and a delay of six days can only be accounted for by attributing it to the malice and vindictiveness of the woman who seemed to be in charge of the proceedings.

The keen disappointment of Mrs. Terry, and those

who were under her influence, at Judge Terry's failure to murder Justice Field, must have been greatly soothed by the prospect of having yet another chance at the latter's life, and, in any event, of seeing him in a cell in the jail during the six days for which the examination could be delayed for that express purpose. The sheriff of San Joaquin county proceeded to San Francisco with the warrant for his arrest on Thursday evening. In company with the chief of police and Marshal Franks, he called upon Justice Field, and after a few moments' conversation it was arranged that he should present the warrant at one o'clock on the following day, at the building in which the federal courts are held.

## CHAPTER XV.

### JUSTICE FIELD'S ARREST AND PETITION FOR RELEASE ON HABEAS CORPUS.

At the appointed hour Justice Field awaited the sheriff in his chambers, surrounded by friends, including judges, ex-judges, and members of the bar. As the sheriff entered Justice Field arose and pleasantly greeted him. The sheriff bore himself with dignity, and with a due sense of the extraordinary proceeding in which his duty as an officer required him to be a participant. With some agitation he said: "Justice Field, I presume you are aware of the nature of my errand." "Yes," replied the Justice, "proceed with your duty; I am ready. An officer should always do his duty." The sheriff stated to him that he had a warrant, duly executed and authenticated, and asked him if he should read it. "I will waive that, Mr. Sheriff," replied the Justice. The sheriff then handed him the warrant, which he read, folded it up and handed it back, saying pleasantly: "I recognize your authority, sir, and submit to the arrest; I am, sir, in your custody."

Meanwhile a petition had been prepared to be presented to Judge Sawyer for a writ of *habeas corpus*,

returnable at once before the United States court. As soon as the arrest was made the petition was signed and presented to Judge Sawyer, who ordered the writ to issue returnable forthwith. In a very few minutes U. S. Marshal Franks served the writ on the sheriff.

While the proceedings looking to the issue of the writ were going on, Justice Field had seated himself, and invited the sheriff to be seated. The latter complied with the invitation, and began to say something in regard to the unpleasant duty which had devolved upon him, but Justice Field promptly replied: "Not so, not so; you are but doing your plain duty, and I mine in submitting to arrest. It is the first duty of judges to obey the law."

As soon as the *habeas corpus* writ had been served, the sheriff said he was ready to go into the court. "Let me walk with you," said Justice Field, as they arose, and took the sheriff's arm. In that way they entered the court-room. Justice Field seated himself in one of the chairs usually occupied by jurors. Time was given to the sheriff to make a formal return to the writ, and in a few minutes he formally presented it. The petition of Judge Field for the writ set forth his official character, and the duties imposed upon him by law, and alleged that he had been illegally arrested, while he was in the discharge of those duties, and that his illegal detention interfered with and prevented him from discharging them.

Then followed a statement of the facts, showing the arrest and detention to be illegal. This statement embraced the principal facts connected with the contempt proceedings in 1888, and the threats then and thereafter made by the Terrys of violence upon Justice Field; the precautions taken in consequence thereof by the Department of Justice for his protection from violence at their hands, and the murderous assault made upon him, and his defense by Deputy Marshal Neagle, resulting in the death of Terry, and that he, the petitioner, in no manner defended or protected himself, and gave no directions to the deputy marshal, and that he was not armed with any weapon. The petition then states: "That under the circumstances detailed, the said Sarah Althea Terry, as your petitioner is informed and believes, and upon such information and belief alleges, falsely and maliciously swore out the warrant of arrest hereinbefore set out against your petitioner, without any further basis for the charge of murder than the facts hereinbefore detailed, and that the warrant aforesaid was issued by such justice of the peace, without any just or probable cause therefor. \* \* \*

And your petitioner further represents that the charge against him, and the warrant of arrest in the hands of said sheriff, are founded upon the sole affidavit of Mrs. Sarah Althea Terry, who was not present and did not see the shooting which caused the death of said David S. Terry."



In order to show the little reliance to be placed in the oath of Mrs. Terry, the petition stated: "That in a suit brought by William Sharon, now deceased, against her before her marriage to the said Terry, it was proved and held by the Circuit Court of the United States that she had committed the forgery of the document produced in that case, and had attempted to support it by perjury and subornation of perjury, and had also been guilty of acts and conduct showing herself to be an abandoned woman, without veracity. \* \* \*

"Your petitioner further represents that the abandoned character of the said Sarah Althea Terry, and the fact that she was found guilty of perjury and forgery in the case above mentioned by the said Circuit Court, and the fact of the revengeful malice entertained toward your petitioner by said Sarah Althea Terry, are notorious in the State of California, and are notorious in the city of Stockton, and as your petitioner believes are well known to the district attorney of the said county of San Joaquin, and also to the said justice of the peace who issued the said warrant; and your petitioner further alleges that had either of the said officers taken any pains whatever to ascertain the truth in the case, he would have ascertained and known that there was not the slightest pretext or foundation for any such charge as was made, and also that the affidavit of the said Sarah Althea Terry was not entitled to the slightest consideration whatever.

“Your petitioner further states that it is to him incomprehensible how any man, acting in a consideration of duty, could have listened one moment to charges from such a source, and without having sought some confirmation from disinterested witnesses; and your petitioner believes and charges that the whole object of the proceeding is to subject your petitioner to the humiliation of arrest and confinement at Stockton, where the said Sarah Althea Terry may be able, by the aid of partisans of hers, to carry out her long-continued and repeated threats of personal violence upon your petitioner, and to prevent your petitioner from discharging the duties of his office in cases pending against her in the federal court at San Francisco.”

The sheriff's return was as follows :

“Return of sheriff of San Joaquin county, Cala.,  
County of San Joaquin, State of California :

“SHERIFF'S OFFICE.

“*To the Honorable Circuit Court of the United States  
for the Northern District of California :*

“I hereby certify and return that before the coming to me of the hereto-annexed writ of *habeas corpus*, the said Stephen J. Field was committed to my custody, and is detained by me by virtue of a warrant issued out of the justice's court of Stockton township, State of California, county of San Joaquin, and by the endorsement made upon said warrant. Copy of said warrant and endorsement is annexed hereto, and made a part of this return. Nevertheless, I have the body

of the said Stephen J. Field before the honorable court, as I am in the said writ commanded.

“August 16, 1889.

“THOMAS CUNNINGHAM,  
“*Sheriff, San Joaquin Co., California.*”

In order to give the petitioner time to traverse the return if he thought it expedient to do so, and to give him and the State time to produce witnesses, the further hearing upon the return was adjourned until the following Thursday morning, the 22d, and the petitioner was released on his recognizance with a bond fixed at \$5,000.

On the same day a petition on the part of Neagle was presented to Judge Sawyer asking that a writ of *habeas corpus* issue in his behalf to Sheriff Cunningham. The petition was granted at once, and served upon the sheriff immediately after the service of the writ issued on behalf of Justice Field. Early on the morning of Saturday, August 17, Neagle was brought from Stockton by the sheriff at 4.30 A. M. District Attorney White and Mrs. Terry's lawyer, Maguire, were duly notified of this movement and were passengers on the same train. At 10.30 Sheriff Cunningham appeared in the Circuit Court with Neagle to respond to the writ. He returned that he held Neagle in custody under a warrant issued by a justice of the peace of that county, a copy of which he produced; and also a copy of the affidavit of Sarah Althea Terry



upon which the warrant was issued. A traverse to that return was then filed, presenting various grounds why the petitioner should not be held, the most important of which were that an officer of the United States, specially charged with a particular duty, that of protecting one of the justices of the Supreme Court of the United States whilst engaged in the performance of his duty, could not, for an act constituting the very performance of that duty, be taken from the further discharge of his duty and imprisoned by the State authorities, and that when an officer of the United States in the discharge of his duties is charged with an offense consisting in the performance of those duties, and is sought to be arrested, and taken from the further performance of them, he can be brought before the tribunals of the nation of which he is an officer, and the fact then inquired into. The attorney-general of the State appeared with the district attorney of San Joaquin county, and contended that the offense of which the petitioner was charged could only be inquired into before the tribunals of the State.

## CHAPTER XVI.

### JUDGE TERRY'S FUNERAL—REFUSAL OF THE SUPREME COURT OF CALIFORNIA TO ADJOURN ON THE OCCASION.

The funeral of Judge Terry occurred on Friday, the 16th. An unsuccessful attempt was made for a public demonstration. The fear entertained by some that eulogies of an incendiary character would be delivered was not realized. The funeral passed off without excitement. The rector being absent, the funeral service was read by a vestryman of the church.

On the day after Judge Terry's death the following proceedings occurred in the Supreme Court of the State :

Late in the afternoon, just after the counsel in a certain action had concluded their argument, and before the next cause on the calendar was called, James L. Crittenden, Esq., who was accompanied by W. T. Baggett, Esq., arose to address the court. He said : " Your honors, it has become my painful and sad duty to formally announce to the court the death of a former chief justice "——

Chief Justice Beatty: " Mr. Crittenden, I think that is a matter which should be postponed until the court has had a consultation about it."



The court then, without leaving the bench, held a whispered consultation. Mr. Crittenden then went on to say : “ I was doing this at the request of several friends of the deceased. It has been customary for the court to take formal action prior to the funeral. In this instance, I understand the funeral is to take place to-morrow.”

Chief Justice Beatty : “ Mr. Crittenden, the members of the court wish to consult with each other on this matter, and you had better postpone your motion of formal announcement until to-morrow morning.”

Mr. Crittenden and Mr. Baggett then withdrew from the court-room.

On the following day, in the presence of a large assembly, including an unusually large attendance of attorneys, Mr. Crittenden renewed his motion. He said :

“ If the court please, I desire to renew the matter which I began to present last evening. As a friend—a personal friend—of the late Judge Terry, I should deem myself very cold, indeed, and very far from discharging the duty which is imposed upon that relation, if I did not present the matter which I propose to present to this bench this morning. I have known the gentleman to whom I have reference for over thirty years, and I desire simply now, in stating that I make this motion, to say that the friendship of so many years, and the acquaintance and intimacy existing between that gentleman and his family and myself for so long a period, require that I should at this time move this court, as a

court, out of recollection for the memory of the man who presided in the Supreme Court of this State for so many years with honor, ability, character, and integrity, and, therefore, I ask this court, out of respect for his memory, to adjourn during the day on which he is to be buried, which is to-day."

Chief Justice Beatty said :

"I regret very much that counsel should have persisted in making this formal announcement, after the intimation from the court. Upon full consultation we thought it would be better that it should not be done. The circumstances of Judge Terry's death are notorious, and under these circumstances this court had determined that it would be better to pass this matter in silence, and not to take any action upon it ; and that is the order of the court."

The deceased had been a chief justice of the tribunal which, by its silence, thus emphasized its condemnation of the conduct by which he had placed himself without the pale of its respect.

## CHAPTER XVII.

### HABEAS CORPUS PROCEEDINGS IN JUSTICE FIELD'S CASE.

On Thursday, August 22d, the hearing of the *habeas corpus* case of Justice Field commenced in the United States Circuit Court, under orders from the Attorney-General, to whom a report of the whole matter had been telegraphed. The United States district attorney appeared on behalf of Justice Field. In addition to him there also appeared as counsel for Justice Field, Hon. Richard T. Mesick, Saml. M. Wilson, Esq., and W. F. Herrin, Esq. The formal return of the writ of *habeas corpus* had been made by the sheriff of San Joaquin county on the 16th. To that return Justice Field presented a traverse, which was in the following language, and was signed and sworn to by him :

“The petitioner, Stephen J. Field, traverses the return of the sheriff of San Joaquin county, State of California, made by him to the writ of *habeas corpus* by the circuit judge on the ninth circuit, and made returnable before the Circuit Court of said circuit, and avers :

“That he is a justice of the Supreme Court of the United States, allotted to the ninth judicial circuit, and is now and has been for several weeks in California, in attendance upon the Circuit Court of said circuit in the discharge of his judicial duties ; and, further, that the

said warrant of the justice of the peace, H. V. J. Swain, in Stockton, California, issued on the 14th day of August, 1889, under which the petitioner is held, was issued by said justice of the peace without reasonable or probable cause, upon the sole affidavit of one Sarah Althea Terry, who did not see the commission of the act which she charges to have been a murder, and who is herself a woman of abandoned character, and utterly unworthy of belief respecting any matter whatever ; and, further, that the said warrant was issued in the execution of a conspiracy, as your petitioner is informed, believes, and charges, between the said Sarah Althea Terry and the district attorney, White, and the said justice of the peace, H. V. J. Swain, and one E. L. Colnon, of said Stockton, to prevent by force and intimidation your petitioner from discharging the duties of his office hereafter, and to injure him in his person on account of the lawful discharge of the duties of his office heretofore, by taking him to Stockton, where he could be subjected to indignities and humiliation, and where they might compass his death.

“That the said conspiracy is a crime against the United States, under the laws thereof, and was to be executed by an abuse of the process of the State court, two of said conspirators being officers of the said county of San Joaquin, one the district attorney and the other a justice of the peace, the one to direct and the other to issue the warrant upon which your petitioner could be arrested.

“And the petitioner further avers that the issue of said writ of *habeas corpus* and the discharge of your petitioner thereunder were and are essential to defeat the execution of the said conspiracy.

“And your petitioner further avers that the accusation of crime against him, upon which said warrant was issued, is a malicious and malignant falsehood, for which there is not even a pretext ; that he neither ad-

vised nor had any knowledge of the intention of any one to commit the act which resulted in the death of David S. Terry, and that he has not carried or used any arm or weapon of any kind for nearly thirty years.

“All of which your petitioner is ready to establish by full and competent proof.

“Wherefore your petitioner prays that he may be discharged from said arrest and set at liberty.

“STEPHEN J. FIELD.”

The facts alleged in this document were beyond dispute, and constituted an outrageous crime, and one for which the conspirators were liable to imprisonment for a term of six years, under section 5518 of the Revised Statutes of the United States. To this traverse the counsel for the sheriff filed a demurrer, on the ground that it did not appear by it that Justice Field was in custody for an act done or omitted in pursuance of any law of the United States, or of any order or process or decree of any court or judge thereof, and it did not appear that he was in custody in violation of the Constitution or any law or treaty of the United States. The case was thereupon submitted with leave to counsel to file briefs at any time before the 27th of August, to which time the further hearing was adjourned.

Before that hearing the Governor of the State addressed the following communication to the attorney-general :



“EXECUTIVE DEPARTMENT,  
 “STATE OF CALIFORNIA,  
 “SACRAMENTO, *August 21, 1889.*

“HON. A. G. JOHNSTON,  
*“Attorney-General, Sacramento.*

“DEAR SIR: The arrest of Hon. Stephen J. Field, a justice of the Supreme Court of the United States, on the unsupported oath of a woman who, on the very day the oath was taken, and often before, threatened his life, will be a burning disgrace to the State unless disavowed. I therefore urge upon you the propriety of at once instructing the district attorney of San Joaquin county to dismiss the unwarranted proceedings against him.

“The question of the jurisdiction of the state courts in the case of the deputy United States marshal, Neagle, is one for argument. The unprecedented indignity on Justice Field does not admit of argument.

“Yours truly,  
 “R. W. WATERMAN,  
*“Governor.”*

This letter of Governor Waterman rang out like an alarm bell, warning the chief law officer of the State that a subordinate of his was prostituting its judicial machinery to enable a base woman to put a gross indignity upon a justice of the Supreme Court of the United States, whom she had just publicly threatened to kill, and also to aid her in accomplishing that purpose. The wretched proceeding had already brought upon its authors indignant denunciation and merciless ridicule from every part of the Union. The attorney-general responded to the call thus made upon him by

instructing the district attorney to dismiss the charge against Justice Field, because no evidence existed to sustain it.

The rash young district attorney lost no time in extricating himself from the position in which the arrest of Justice Field had placed him. On the 26th of August, upon his motion, and the filing of the attorney-general's letter, the charge against Justice Field was dismissed by the justice of the peace who had issued the warrant against him.

The dismissal of this charge released him from the sheriff's claim to his custody, and the *habeas corpus* proceedings in his behalf fell to the ground. On the 27th, the day appointed for the further hearing, the sheriff announced that in compliance with the order of the magistrate he released Justice Field from custody, whereupon the case of *habeas corpus* was dismissed.

In making the order, Circuit Judge Sawyer severely animadverted on what he deemed the shameless proceeding at Stockton. He said :

"We are glad that the prosecution of Mr. Justice Field has been dismissed, founded, as it was, upon the sole, reckless, and as to him manifestly false affidavit of one whose relation to the matters leading to the tragedy, and whose animosity towards the courts and judges who have found it their duty to decide against her, and especially towards Mr. Justice Field, is a part of the judicial and notorious public history of the country.

“It was, under the circumstances, and upon the sole affidavit produced, especially after the coroner’s inquest, so far as Mr. Justice Field is concerned, a shameless proceeding, and, as intimated by the Governor of the Commonwealth, if it had been further persevered in, would have been a lasting disgrace to the State.

“While a justice of the Supreme Court of the United States, like every other citizen, is amenable to the laws, he is not likely to commit so grave an offense as murder, and should he be so unfortunate as to be unavoidably involved in any way in a homicide, he could not afford to escape, if it were in his power to do so; and when the act is so publicly performed by another, as in this instance, and is observed by so many witnesses, the officers of the law should certainly have taken some little pains to ascertain the facts before proceeding to arrest so distinguished a dignitary, and to attempt to incarcerate him in prisons with felons, or to put him in a position to be further disgraced, and perhaps assaulted by one so violent as to be publicly reported, not only then but on numerous previous occasions, to have threatened his life.

“We are extremely gratified to find that, through the action of the chief magistrate, and the attorney-general, a higher officer of the law, we shall be spared the necessity of further inquiring as to the extent of the remedy afforded the distinguished petitioner, by the Constitution and laws of the United States, or of enforcing such remedies as exist, and that the stigma cast upon the State of California by this hasty and, to call it by no harsher term, ill-advised arrest will not be intensified by further prosecution.”

Thus ended this most remarkable attempt upon the liberty of a United States Supreme Court Justice, under color of State authority, the execution of which would again have placed his life in great peril.

The grotesque feature of the performance was aptly presented by the following imaginary dialogue which appeared in an Eastern paper :

Newsboy : " Man tried to kill a judge in California ! "

Customer : " What was done about it ? "

Newsboy : " Oh ! They arrested the judge. "

The illegality of Justice Field's arrest will be perfectly evident to whoever will read sections 811, 812, and 813 of the Penal Code of California. These sections provide that no warrant can be issued by a magistrate until he has examined, on oath, the informant, taken depositions setting forth the facts tending to establish the commission of the offense and the guilt of the accused, and himself been satisfied by these depositions that there is reasonable ground that the person accused has committed the offense. None of these requirements had been met in Justice Field's case.

It needs no lawyer to understand that a magistrate violates the plain letter as well as the spirit of these provisions of law when he issues a warrant without first having before him some evidence of the probable, or at least the possible, guilt of the accused. If this were otherwise, private malice could temporarily sit in judgment upon the object of its hatred, however blameless, and be rewarded for perjury by being allowed the use of our jails as places in which to satisfy its vengeance. Such a view of the law made Sarah Althea

the magistrate at Stockton on the 14th of August, and Justice Swain her obsequious amanuensis. Such a view of the law would enable any convict who had just served a term in the penitentiary to treat himself to the luxury of dragging to jail the judge who sentenced him, and keeping him there without bail as long as the magistrate acting for him could be induced to delay the examination.

The arrest of Justice Field was an attempt to kidnap him for a foul purpose, and if the United States circuit judge had not released him he would have been the victim of as arbitrary and tyrannical treatment as is ever meted out in Russia to the most dangerous of nihilists, to punish him for having narrowly escaped assassination by no act or effort of his own.



## CHAPTER XVIII.

### HABEAS CORPUS PROCEEDINGS IN NEAGLE'S CASE.

This narrative would not be complete without a statement of the proceedings in the United States Circuit Court, and in the United States Supreme Court on appeal, in the *habeas corpus* proceedings in the case of Neagle, the deputy marshal, whose courageous devotion to his official duties had saved the life of Justice Field at the expense of that of his would-be assassin. We have already seen that Neagle, being in the custody of the sheriff of San Joaquin county, upon a charge of murder in the shooting of Judge Terry, had presented a petition to the United States Circuit Court for a writ of *habeas corpus* to the end that he might thereby be restored to his liberty.

A writ was issued, and upon its return, August 17th, the sheriff of San Joaquin county produced Neagle and a copy of the warrant under which he held him in custody, issued by the justice of the peace of that county, and also of the affidavit of Sarah Althea Terry, upon which the warrant was granted. Neagle being desirous of traversing the return of the sheriff, further proceedings were adjourned until the 22d of the month, and in the meantime he was placed in the custody of the

United States marshal for the district. On the 22d a traverse of the return was filed by him stating the particulars of the homicide with which he was charged as narrated above, and averring that he was at the time of its commission a deputy marshal of the United States for the district, acting under the orders of his superior, and under the directions of the Attorney-General of the United States in protecting the Associate Justice, whilst in the discharge of his duties, from the threatened assault and violence of Terry, who had declared that on meeting the Justice he would insult, assault, and kill him, and that the homicide with which the petitioner is charged was committed in resisting the attempted execution of these threats in the belief that Terry intended at the time to kill the Justice, and that but for such homicide he would have succeeded in his attempt. These particulars are stated with great fullness of detail. To this traverse, which was afterwards amended, but not in any material respect, a demurrer was interposed for the sheriff by the district attorney of San Joaquin county. Its material point was that it did not appear from the traverse that Neagle was in the custody of the sheriff for an act done or omitted in pursuance of any law of the United States, or any order, process, or decree of any court or judge thereof, or in violation of the Constitution or a treaty of the United States. The court then considered

whether it should hear testimony as to the facts of the case, or proceed with the argument of the demurrer to the traverse. It decided to take the testimony, and to hear counsel when the whole case was before it, on the merits as well as on the question of jurisdiction. The testimony was then taken. It occupied several days, and brought out strongly the facts which have been already narrated, and need not here be repeated. When completed, the question of the jurisdiction of the Circuit Court of the United States to interfere in the matter was elaborately argued by the attorney-general of the State, and special counsel who appeared with the district attorney of San Joaquin county on behalf of the State, they contending that the offense, with which the petitioner was charged, could only be inquired into before a tribunal of the State. Mr. Carey, United States district attorney, and Messrs. Herrin, Mesick, and Wilson, special counsel, appeared on behalf of the petitioner, and contended for the jurisdiction, and for the discharge of the petitioner upon the facts of the case. They did not pretend that any person in the State, be he high or low, might not be tried by the local authorities for a crime committed against the State, but they did contend that when the alleged crime consisted in an act which was claimed to have been done in the performance of a duty devolving upon him by a law of the United States, it was

within the competency of their courts to inquire, in the first instance, whether that act thus done was in the performance of a duty devolving upon him ; and if it was, that the alleged offender had not committed a crime against the State, and was entitled to be discharged. Their arguments were marked by great ability and learning, and their perusal would be interesting and instructive, but space will not allow me to give even a synopsis of them.

The court, in deciding the case, went into a full and elaborate consideration, not only of its jurisdiction, but of every objection on the merits presented by counsel on behalf of the State. Only a brief outline can be given.

The court held that it was within the competency of the President, and of the Attorney-General as the head of the Department of Justice, representing him, to direct that measures be taken for the protection of officers of the Government whilst in the discharge of their duties, and that it was specially appropriate that such protection should be given to the justices of the Supreme Court of the United States, whilst thus engaged in their respective circuits, and in passing to and from them ; that the Attorney-General, representing the President, was fully justified in giving orders to the marshal of the California district to appoint a deputy to look specially to the protection of Justices Field and Saw-

yer from assault and violence threatened by Terry and his wife; and that the deputy marshal, acting under instructions for their protection, was justified in any measures that were necessary for that purpose, even to taking the life of the assailant.

The court recognized that the Government of the United States exercised full jurisdiction, within the sphere of its powers, over the whole territory of the country, and that when any conflict arose between the State and the General Government in the administration of their respective powers, the authority of the United States must prevail, for the Constitution declares that it and the laws of the United States in pursuance thereof "shall be the supreme law of the land, and that the judges in every State shall be bound thereby, anything in the Constitution and laws of any State to the contrary notwithstanding." The court quoted the language of the Supreme Court in *Tennessee v. Davis* (100 U. S. 257, 263), that "It [the General Government] can act only through its officers and agents, and they must act within the States. If, when thus acting and within the scope of their authority, those officers can be arrested and brought to trial in a State court, for an alleged offense against the law of the State, yet warranted by the Federal authority they possess, and if the General Government is powerless to interfere at once for their protection—if their protec-



tion must be left to the action of the State court—the operations of the General Government may, at any time, be arrested at the will of one of its members. The legislation of a State may be unfriendly. It may affix penalties to acts done under the immediate direction of the National Government and in obedience to its laws. It may deny the authority conferred by those laws. The State court may administer not only the laws of the State, but equally Federal law, in such a manner as to paralyze the operations of the Government. And even if, after trial and final judgment in the State court, a case can be brought into the United States court for review, the officer is withdrawn from the discharge of his duty during the pendency of the prosecution, and the exercise of acknowledged Federal power arrested. We do not think such an element of weakness is to be found in the Constitution. The United States is a government with authority extending over the whole territory of the Union, acting upon the States and upon the people of the States. While it is limited in the number of its powers, so far as its sovereignty extends, it is supreme. No State government can exclude it from the exercise of any authority conferred upon it by the Constitution, obstruct its authorized officers against its will, or withhold from it, for a moment, the cognizance of any subject which that instrument has committed to it.” To this strong language the Circuit Court added :

“The very idea of a government composed of executive, legislative, and judicial departments necessarily comprehends the power to do all things, through its appropriate officers and agents, within the scope of its general governmental purposes and powers, requisite to preserve its existence, protect it and its ministers, and give it complete efficiency in all its parts. It necessarily and inherently includes power in its executive department to enforce the laws, keep the national peace with regard to its officers while in the line of their duty, and protect by its all-powerful arm all the other departments and the officers and instrumentalities necessary to their efficiency while engaged in the discharge of their duties.”

In language attributed to Mr. ex-Secretary Bayard, used with reference to this very case, which we quote, not as a controlling judicial authority, but for its intrinsic, sound, common sense, “The robust and essential principle must be recognized and proclaimed, that the inherent powers of every government which is sufficient to authorize and enforce the judgment of its courts are, equally, and at all times, and in all places, sufficient to protect the individual judge who, fearlessly and conscientiously in the discharge of his duty, pronounces those judgments.”

In reference to the duties of the President and the powers of the Attorney-General under him, and of the latter's control of the marshals of the United States, the court observed that the duties of the President are prescribed in terse and comprehensive language in

section 3 of article II of the Constitution, which declares that "he shall take care that the laws be faithfully executed ;" that this gives him all the authority necessary to accomplish the purposes intended—all the authority necessarily inherent in the office, not otherwise limited, and that Congress, added the court, in pursuance of powers vested in it, has provided for seven departments, as subordinate to the President, to aid him in performing his executive functions. Section 346, R. S., provides that "there shall be at the seat of government an executive department to be known as the Department of Justice, and an Attorney-General, who shall be the head thereof." He thus has the general supervision of the executive branch of the national judiciary, and section 362 provides, as a portion of his powers and duties, that he "shall exercise general superintendence and direction over the attorneys and marshals of all the districts in the United States and the Territories as to the manner of discharging their respective duties ; and the several district attorneys and marshals are required to report to the Attorney-General an account of their official proceedings, and of the state and condition of their respective offices, in such time and manner as the Attorney-General may direct." Section 788, R. S., provides that "the marshals and their deputies shall have, in each State, the same powers in executing the

laws of the United States as the sheriffs and their deputies in such State may have, by law, in executing the laws thereof." By section 817 of the penal code of California the sheriff is a "peace officer," and by section 4176 of the political code he is "to preserve the peace" and "prevent and suppress breaches of the peace." The marshal is, therefore, under the provisions of the statute cited, "a peace officer," so far as keeping the peace in any matter wherein the powers of the United States are concerned, and as to such matters he has all the powers of the sheriff, as peace officer under the laws of the State. He is, in such matters, "to preserve the peace" and "prevent and suppress breaches of the peace." An assault upon or an assassination of a judge of a United States court while engaged in any matter pertaining to his official duties, on account or by reason of his judicial decisions, or action in performing his official duties, is a breach of the peace, affecting the authority and interests of the United States, and within the jurisdiction and power of the marshal or his deputies to prevent as a peace officer of the National Government. Such an assault is not merely an assault upon the person of the judge as a man; it is an assault upon the national judiciary, which he represents, and through it an assault upon the authority of the nation itself. It is, necessarily, a breach of the national peace. As a

national peace officer, under the conditions indicated, it is the duty of the marshal and his deputies to prevent a breach of the national peace by an assault upon the authority of the United States, in the person of a judge of its highest court, while in the discharge of his duty. If this be not so, in the language of the Supreme Court, "Why do we have marshals at all?" What useful functions can they perform in the economy of the National Government?

Section 787 of the Revised Statutes also declares that "It shall be the duty of the marshal of each district to attend the District and Circuit Courts when sitting therein, and to execute throughout the district all lawful precepts directed to him and issued under the authority of the United States, and he shall have power to command all necessary assistance in the execution of his duty." There is no more authority specifically conferred upon the marshal by this section to protect the judge from assassination in open court, without a specific order or command, than there is to protect him out of court, when on the way from one court to another in the discharge of his official duties. The marshals are in daily attendance upon the judges, and performing official duties in their chambers. Yet no statute specifically points out those duties or requires their performance. Indeed, no such places as chambers for the circuit judges or circuit justices are



mentioned at all in the statutes. Yet the marshal is as clearly authorized to protect the judges there as in the court-room. All business done out of court by the judge is called chamber business. But it is not necessary to be done in what is usually called chambers. Chamber business may be done, and often is done, on the street, in the judge's own house, at the hotel where he stops, when absent from home, or it may be done in transitu, on the cars in going from one place to another within the proper jurisdiction to hold court. Mr. Justice Field could, as well, and as authoritatively, issue a temporary injunction, grant a writ of *habeas corpus*, an order to show cause, or do any other chamber business for the district in the dining-room at Lathrop, as at his chambers in San Francisco, or in the court-room. The chambers of the judge, where chambers are provided, are not an element of jurisdiction, but are a convenience to the judge, and to suitors—places where the judge at proper times can be readily found, and the business conveniently transacted.

But inasmuch as the Revised Statutes of the United States (sec. 753) declare that the writ of *habeas corpus* shall not extend to "a prisoner in jail unless where he is in custody—for an act done or omitted in pursuance of a *law* of the United States, or of an order, process, or decree of a court or judge thereof, or in custody in

violation of the Constitution or of a law or treaty of the United States," it was urged in the argument by counsel for the State that there is no statute which specifically makes it the duty of a marshal or deputy marshal to protect the judges of the United States whilst out of the court-room, travelling from one point to another in their circuits, on official business, from the violence of litigants who have become offended at the adverse decisions made by them in the performance of their judicial duties, and that such officers are not within the provisions of that section. To this the court replied that the language of the section is, "an act done in pursuance of a *law* of the United States"—not in pursuance of a statute of the United States; and that the statutes do not present in express terms all the law of the United States; that their incidents and implications are as much a part of the law as their express provisions; and that when they prescribe duties providing for the accomplishment of certain designated objects, or confer authority in general terms, they carry with them all the powers essential to effect the ends designed. As said by Chief Justice Marshall in *Osborn v. Bank of the United States* (9 Wheaton, 865-866), "It is not unusual for a legislative act to involve consequences which are not expressed. An officer, for example, is ordered to arrest an individual. It is not necessary, nor is it usual, to say that he shall

not be punished for obeying this order. His security is implied in the order itself. It is no unusual thing for an act of Congress to imply, without expressing, this very exemption from State control, which is said to be so objectionable in this instance. The collectors of the revenue, the carriers of the mail, the mint establishment, and all those institutions which are public in their nature, are examples in point. It has never been doubted that all who are employed in them are protected while in the line of duty; and yet this protection is not expressed in any act of Congress. It is incidental to, and is implied in, the several acts by which these institutions are created; and is secured to the individuals employed in them by the judicial power alone—that is, the judicial power is the instrument employed by the Government in administering this security.”

Upon this the Circuit Court observed :

“ If the officers referred to in the preceding passage are to be protected while in the line of their duty, without any special law or statute requiring such protection, the judges of the courts, the principal officers in a department of the Government second to no other, are also to be protected, and their executive subordinates—the marshals and their deputies—shielded from harm by the national laws while honestly engaged in protecting the heads of the courts from assassination.”

---

NOTE.—I find the following apt illustrations of this doctrine in a journal of the day :

If a military or naval officer of the United States, in the necessary

To the position that the preservation of the peace of the State is devolved solely upon the officers of the State, and not in any respect upon the marshals of the United States, the court replied: This position is al-

suppression of a mutiny or enforcement of obedience, should wound or take the life of a subordinate, would it be contended that, if arrested for that act by the State authority, he could not be released on *habeas corpus*, because no statute expressly authorized the performance of the act? If the commander of a revenue cutter should be directed to pursue and retake a vessel which, after seizure, had escaped from the custody of the law, and the officer in the performance of that duty, and when necessary to overcome resistance, should injure or kill a member of the crew of the vessel he was ordered to recapture, and if for that act he should be arrested and accused of crime under the State authority, will any sensible person maintain that the provisions of the *habeas corpus* act could not be invoked for his release, notwithstanding that no statute could be shown which directly authorized the act for which he was arrested? If by command of the President a company of troops were marched into this city to protect the subtreasury from threatened pillage, and in so doing life were taken, would not the act of the officer who commanded the troops be an act done in pursuance of the laws of the United States, and in the lawful exercise of its authority? Could he be imprisoned and tried before a State jury on the charge of murder, and the courts of the United States be powerless to inquire into the facts on *habeas corpus*, and to discharge him if found to have acted in the performance of his duty? Can the authority of the United States for the protection of their officers be less than their authority to protect their property?

There appears to be but one rational answer to these questions.

In all these cases the authority vested in the officer to suppress a mutiny, or to overtake and capture an escaped vessel, or to protect the subtreasury from threatened pillage, carries with it power to do all things necessary to accomplish the object desired, even the killing of the offending party. The law conferring the authority thus extended to the officer in these cases, is in the sense of the *habeas corpus* act, a law of the United States to do all things necessary for the execution of that authority.



ready answered by what has been said. But it is undoubtedly true that it was the imperative duty of the State to preserve the public peace and amply protect the life of Justice Field, *but it did not do it*, and had the United States relied upon the State to keep the peace as to him—one of the justices of the highest court—in relation to matters concerning the performance of his official duties, they would have leaned upon a broken reed. The result of the efforts to obtain an officer from the State to assist in preserving the peace and protecting him at Lathrop was anything but successful. The officer of the State at Lathrop, instead of arresting the conspirator of the contemplated murderer, the wife of the deceased, arrested the officer of the United States, assigned by the Government to the special duty of protecting the justice against the very parties, while in the actual prosecution of duties assigned to him, without warrant, thereby leaving his charge without the protection provided by the Government he was serving, at a time when such protection seemed most needed. And, besides, the use of the State police force beyond the limits of a county for the protection of Justice Field would have been impracticable, as the powers of the sheriff would have ended at its borders, and of other township and city peace officers at the boundaries of their respective townships and cities. Only a United States marshal or his deputy could have



exercised these official functions throughout the judicial district, which embraces many counties. The only remedy suggested on the part of the State was to arrest the deceased and hold him to bail to keep the peace under section 706 of the Penal Code, the highest limit of the amount of bail being \$5,000. But although the threats are conceded to have been publicly known in the State, no State officer took any means to provide this flimsy safeguard. And the execution of a bond in this amount to keep the peace would have had no effect in deterring the intended assailants from the commission of the offense contemplated, when the penalties of the law would not deter them.

As to the deliberation and wisdom of Neagle's conduct under the circumstances, the court, after stating the established facts, concludes as follows :

“When the deceased left his seat, some thirty feet distant, walked stealthily down the passage in the rear of Justice Field and dealt the unsuspecting jurist two preliminary blows, doubtless by way of reminding him that the time for vengeance had at last come, Justice Field was already at the traditional ‘wall’ of the law. He was sitting quietly at a table, back to the assailant, eating his breakfast, the side opposite being occupied by other passengers, some of whom were women, similarly engaged. When, in a dazed condition, he awoke to the reality of the situation and saw the stalwart form of the deceased with arm drawn back for a final mortal blow, there was no time to get under or over the table, had the law, under any circumstances, re-

quired such an act for his justification. Neagle could not seek a 'wall' to justify his acts without abandoning his charge to certain death. When, therefore, he sprang to his feet and cried, 'Stop! I am an officer,' and saw the powerful arm of the deceased drawn back for the final deadly stroke instantly change its direction to his left breast, apparently seeking his favorite weapon, the knife, and at the same time heard the half-suppressed, disappointed growl of recognition of the man who, with the aid of half a dozen others, had finally succeeded in disarming him of his knife at the court-room a year before, the supreme moment had come, or, at least, with abundant reason he thought so, and fired the fatal shot. The testimony all concurs in showing this to be the state of facts, and the almost universal consensus of public opinion of the United States seems to justify the act. On that occasion a second, or two seconds, signified, at least, two valuable lives, and a reasonable degree of prudence would justify a shot one or two seconds too soon rather than a fraction of a second too late. Upon our minds the evidence leaves no doubt whatever that the homicide was fully justified by the circumstances. Neagle on the scene of action, facing the party making a murderous assault, knowing by personal experience his physical powers and his desperate character, and by general reputation his life-long habit of carrying arms, his readiness to use them, and his angry, murderous threats, and seeing his demoniac looks, his stealthy assault upon Justice Field from behind, and, remembering the sacred trust committed to his charge—Neagle, in these trying circumstances, was the party to determine when the supreme moment for action had come, and if he, honestly, acted with reasonable judgment and discretion, the law justifies him, even if he erred. But who will have the courage to stand up in the presence of the facts developed by the testimony in this case, and

say that he fired the smallest fraction of a second too soon ?

“ In our judgment he acted, under the trying circumstances surrounding him, in good faith and with consummate courage, judgment, and discretion. The homicide was, in our opinion, clearly justifiable in law, and in the forum of sound, practical common sense commendable. This being so, and the act having been ‘done \* \* \* in pursuance of a law of the United States,’ as we have already seen, it cannot be an offense against, and he is not amenable to, the laws of the State.”

The petitioner was accordingly discharged from arrest.

## CHAPTER XIX.

### EXPRESSIONS OF PUBLIC OPINION.

This case and all the attendant circumstances—the attempted assassination of Justice Field by his former associate, Terry ; the defeat of this murderous attempt by Deputy Marshal Neagle ; the arrest of Justice Field and the deputy marshal upon the charge of murder, and their discharge—created very great interest throughout the United States. They were the subject of articles in all the leading journals of the country ; and numerous telegrams and letters of congratulation were sent to the Justice on his escape from the murderous attempt. Satisfaction was very generally expressed at the fate which Terry met, and much praise was given to the courageous conduct of Neagle and at the bearing of Justice Field under the trying circumstances.

A few of the letters received by him are here given, and citations are made from some of the periodicals, which indicated the general sentiment of the country.

Letter from Hon. T. F. Bayard, ex-Secretary of State :

WILMINGTON, DELAWARE, *August 18, 1889.*

MY DEAR BROTHER FIELD :

I was absent from home when I first saw in the newspapers an account of the infamous assault of the

Terrys—husband and wife—upon you, and the prompt and courageous action of Deputy Marshal Neagle that happily frustrated the iniquitous plot against your life.

Accept, my dear friend, my fervent congratulations on your escape from the designs of this madman and of the shameless creature who was his wife and accomplice.

For the sake of our country and its reputation in the eyes of Christendom, I am indeed grateful that this vile stab at its judicial power, as vested in your personality, miscarried, and that by good fortune the insane malice of a disappointed suitor should have been thwarted.

Your dignified courage in this tragical episode is most impressive, and, while it endears you the more to those who love you, will wring even from your foes a tribute of respect and admiration.

Passing over the arguments that may be wrought out of the verbiage of our dual constitution of government, the robust and essential principle *must* be recognized and proclaimed—that the *inherent powers* of every government which are sufficient to authorize and enforce the judgments of its courts are equally and at all times and in all places sufficient to protect the individual judge who fearlessly and conscientiously, in the discharge of his duty, pronounces those judgments.

The case, my dear friend, is not yours alone; it is equally mine and that of every other American. A principle so vital to society, to the body politic, was never more dangerously and wickedly assailed than by the assault of Terry and his wife upon you for your just and honorable performance of your duty as a magistrate.

I can well comprehend the shock to which this occurrence has subjected you, and I wish I could be by your side to give you assurance orally (if any were needed) of that absolute sympathy and support to



which you are so fully entitled. But these lines will perhaps suffice to make you feel the affectionate and steadfast regard I entertain for you, and which this terrible event has but increased.

I cannot forbear an expression of the hope that the arguments of jurisdictional and other points which must attend the litigation and settlement of this tragedy may not be abated or warped to meet any temporary local or partisan demand.

The voice of Justice can never speak in clearer or more divine accents than when heard in vindication and honor of her own faithful ministers.

Ever, my dear Judge Field,

Sincerely yours,

T. F. BAYARD.

The Hon. STEPHEN J. FIELD,  
*San Francisco, Cal.*

Letter from Hon. E. J. Phelps, former Minister to England :

BURLINGTON, VERMONT, *August 17, 1889.*

MY DEAR JUDGE FIELD :

Pray let me congratulate you most heartily on the Terry transaction. Nothing that has ever occurred in the administration of justice has given me more satisfaction than this prompt, righteous, and effectual vindication through an officer of the court of the sanctity of the judiciary when in the discharge of its duty. What your marshal did was exactly the right thing, at the right time, and in the right way. I shall be most happy to join in a suitable testimonial to him, if our profession will, as they ought, concur in presenting it.

\* \* \*

Your own coolness and carriage in confronting this danger in the discharge of your duty must be universally admired, and will shed an additional lustre on a

judicial career which was distinguished enough without it.

You have escaped a great peril—acquired a fresh distinction—and vindicated most properly the dignity of your high station.

I am glad to perceive that this is the general opinion.

Anticipating the pleasure of seeing you in Washington next term,

I am always, dear sir,

Most sincerely yours,

E. J. PHELPS.

Letter from Hon. George F. Hoar, Senator from Massachusetts :

WORCESTER, *August* 16, 1889.

MY DEAR JUDGE FIELD :

I think I ought to tell you, at this time, how high you stand in the confidence and reverence of all good men here, how deeply they were shocked by this outrage attempted not so much on you as on the judicial office itself, and how entirely the prompt action of the officer is approved. I hope you may long be spared to the public service.

I am faithfully yours,

GEO. F. HOAR.

Letter from Hon. J. Proctor Knott, for many years a Member of Congress from Kentucky and Chairman of the Judiciary Committee of the House of Representatives, and afterwards Governor of Kentucky :

LEBANON, KENTUCKY, *September* 5, 1889.

MY DEAR JUDGE: \* \* \*

I have had it in mind to write you from the moment I first heard of your fortunate escape from the fiendish

assassination with which you were so imminently threatened, but I have, since the latter part of May, been suffering from a most distressing affection of the eyes which has rendered it extremely difficult, and frequently, for days together, quite impossible to do so. Even now, though much improved, I write in great pain, but I cannot get my consent to delay it longer on any account. You are to be congratulated, my dear friend, and you know that no one could possibly do so with more genuine, heartfelt sincerity than I do myself. \* \* \*

I had been troubled, ever since I saw you had gone to your circuit, with apprehensions that you would be assassinated, or at least subjected to some gross outrage, and cannot express my admiration of the serene heroism with which you went to your post of duty, determined not to debase the dignity of your exalted position by wearing arms for your defense, notwithstanding you were fully conscious of the danger which menaced you. It didn't surprise me, however, for I knew the stuff you were made of had been tested before. But I *was* surprised and disgusted, too, that *you* should have been charged or even suspected of anything wrong in the matter. The magistrate who issued the warrant for your arrest may possibly have thought it his duty to do so, without looking beyond the "railing accusation" of a baffled and infuriated murderess, which all the world instinctively knew to be false, yet I suppose there is not an intelligent man, woman, or child on the continent who does not consider it an infamous and unmitigated outrage, or who is not thoroughly satisfied that the brave fellow who defended you so opportunely was legally and morally justifiable in what he did. I have not been in a condition to *think* very coherently, much less to read anything in relation to the question of jurisdiction raised by the State authorities in the *habeas corpus* issued in your behalf by the U. S. Circuit Court, and it may be that, from the

mere newspaper's reports that have reached me, I have been unable to fully apprehend the objections which are made to the courts hearing all the facts on the trial of the writ ; but it occurs to me as a plain principle of common sense that the federal government should not only have the power, but that it is necessary to its own preservation, to protect its officers from being wantonly or maliciously interfered with, hindered or obstructed in the lawful exercises of their official duties, not arbitrarily of course, but through its regularly constituted agencies, and according to the established principles of law ; and where such obstruction consists in the forcible restraint of the officer's liberty, I see no reason why the federal judiciary should not inquire into it on *habeas corpus*, when it is alleged to be not only illegal but contrived for the very purpose of hindering the officer in the discharge of his official duties, and impairing the efficiency of the public service. It is true that in such an investigation a real or apparent conflict between State and federal authority may be presented, which a due regard to the respective rights of the two governments would require to be considered with the utmost caution, such caution, at least, as it is fair to presume an intelligent court would always be careful to exercise, in view of the absolute importance of maintaining as far as possible the strictest harmony between the two jurisdictions. Yet those rights are determined and by fixed legal principles, which it would be impossible for a court to apply in any case without a competent knowledge of the *facts* upon which their application in the particular case might depend. For instance, if your court should issue a writ of *habeas corpus* for the relief of a federal officer upon the averments in his petition that he was forcibly and illegally restrained of his liberty for the purpose of preventing him from performing his official duties, and it should appear in the return

to the writ that the person detaining the prisoner was a ministerial officer of the State government authorized by its laws to execute its process, and that he held the petitioner in custody by virtue of a warrant of arrest in due form, issued by a competent magistrate, to answer for an offense against the State laws, I presume the court, in the absence of any further showing, would instantly remand the petitioner to the custody of the State authorities without regard to his official position or the nature of his public duties. But, on the other hand, suppose there should be a traverse of the return, averring that the warrant of the arrest, though apparently regular in all respects, was in truth but a fraudulent contrivance designed and employed for the sole purpose of hindering and obstructing the petitioner in the performance of his duties as an officer of the government of the United States; that the magistrate who issued it, knowingly and maliciously abused his authority for that purpose in pursuance of a conspiracy between himself and others, and not in good faith, and upon probable cause to bring the prisoner to justice for a crime against the State. How then? Here is an apparent conflict—not a *real* one—between the rights of the government of the United States and the government of the State. The one has a right to the service of its officer, and the right to prevent his being unlawfully interfered with or obstructed in the performance of his official duties; the other has the right to administer its laws for the punishment of crime through its own tribunals; but it must be observed that the former has no right to shield one of its officers from a valid prosecution for a violation of the laws of the latter not in conflict with the Constitution and laws of the United States, nor can it be claimed that the latter has any right to suffer its laws to be prostituted, and its authority fraudulently abused, in aid of a conspiracy to defeat or obstruct the functions of the former. Such an abuse of authority is not, and cannot be in



any sense, a *bona fide* administration of State laws, but is itself a crime against them. What, then, would your court do? You would probably say : If it is true that this man is held without probable cause under a fraudulent warrant, issued in pursuance of a conspiracy to which the magistrate who issued it was a party, to give legal color to a malicious interference with his functions as a federal official, he is the victim of a double crime—a crime against the United States and a crime against the State—and it is not only our duty to vindicate his right to the free exercise of his official duties, but the right of the federal government to his services, and its right to protect him in the legal performance of the same. But if, on the other hand, he has raised a mere “false clamor”—if he is held in good faith upon a valid warrant to answer for a crime committed against the State, it is equally as obligatory upon us to uphold its authority, and maintain its right to vindicate its own laws through its own machinery. To determine between these two hypotheses we must know the *facts*.

\* \* \* The same simple reasoning, it occurs to me, applies to Mr. Neagle’s case. Whether he acted in the line of his duty under the laws of the United States, as an officer of that government, is clearly a question within the jurisdiction of the federal judiciary. If he *did*, he cannot be held responsible to the State authority ; if he did *not*, he should answer, if required, before its tribunals of justice. I presume no court of ordinary intelligence, State or federal, would question these obvious principles ; but how *any* court could determine whether he did or did not act in the line of his official duty under the laws of his government without a judicial inquiry into the *facts* connected with the transaction I am unable to imagine. \* \* \*

I am, as always,

Your faithful friend,

J. PROCTOR KNOTT.

Hon. S. J. FIELD,

*Associate Justice Supreme Court U. S.*

Letter from Hon. William D. Shipman, formerly U.  
S. District Judge for the district of Connecticut :

NEW YORK, *October 20, 1889.*

DEAR JUDGE :

\* \* \* \* \*

I have attentively read Judge Sawyer's opinion in the Neagle *habeas corpus* case, and I agree with his main conclusions. It seems to me that the whole question of jurisdiction turns on the fact whether you were, at the time the assault was made on you, engaged in the performance of your official duty.

You had been to Los Angeles to hold court there and had finished that business. In going there you were performing an official duty as much as you were when you had held court there. It was then your official duty to go from Los Angeles to San Francisco and hold court there. You could not hold court at the latter place without going, and you were engaged in the line of your official duty in performing that journey for that purpose, as you were in holding the court after you got there. The idea that a judge is not performing official duty when he goes from court-house to court-house or from court-room to court-room in his own circuit seems to me to be absurd. The distance from one court-house or court-room to another is not material, and does not change or modify the act or duty of the judge.

Now, Neagle was an officer of your court, charged with the duty of protecting your person while you were engaged in the performance of your official duty. *His* duty was to see to it that you were not unlawfully prevented from performing *your* official duty—not hindered or obstructed therein. For the State authorities to indict him for repelling the assault on you in the only way which he could do so effectually seems to me to be

as unwarranted by law as it would be for them to indict him for an assault on Terry when he assisted in disarming the latter in the court-room last year.

When, therefore, it was conceded on the argument that if the affair at Lathrop had taken place in the court-room during the sitting of the court, the jurisdiction of the Circuit Court would be unquestionable, it is difficult for me to see why the whole question of federal jurisdiction was not embraced in that concession. Assassinating a judge *on the bench* would no more obstruct and defeat public justice than assassinating him on his way to the bench. In each case he is *proceeding in the line of official duty imposed on him by law and his official oath*. The law requires him to go to court wherever the latter is held, and he is as much engaged in performing the duty thus imposed on him while he is proceeding to the place of his judicial labors as he is in performing the latter after he gets there.

It would, therefore, seem to go without saying that any acts done in defense and protection of the judge in the performance of the duties of his office must pertain to the exclusive jurisdiction of the court of which he forms a part.

The fact that the assault on you was avowedly made in revenge for your judicial action in a case heard by you gives a darker tinge to the deed, but, perhaps, does not change the legal character of the assault itself.

That Neagle did his whole duty, and in no way exceeded it, is too plain for argument.

Yours faithfully,

W. D. SHIPMAN.

Mr. Justice FIELD.

Letter from James C. Welling, president of Columbian University, Washington :

HARTFORD, *August 15, 1889.*

MY DEAR JUDGE:

It is a relief to know that Justice, as well as the honored justice of our Supreme Judiciary, has been avenged by the pistol-shot of Neagle. The life of Terry has long since been forfeited to law, to decency, and to morals. He has already exceeded the limit assigned by holy scripture to men of his ilk. "The bloody-minded man shall not live out half his days." The mode of his death was in keeping with his life. Men who break all the laws of nature should not expect to die by the laws of nature.

In all this episode you have simply worn the judicial ermine without spot or stain. You defeated a bold, bad man in his machinations, and the enmity you thereby incurred was a crown of honor. I am glad that you are to be no longer harassed by the menace of this man's violence, for such a menace is specially trying to a minister of the law. We all know that Judge Field the *man* would not flinch from a thousand Terrys, but Judge Field the *Justice* could hardly take in his own hands the protection of his person, where the threatened outrage sprang *entirely* from his official acts.

I wish, therefore, to congratulate you on your escape alike from the violence of Terry and from the necessity of killing him with your own hands. It was meet that you should have been defended by an executive officer of the court assailed in your person. For doubtless Terry, and the hag who was on the hunt with him, were minded to murder you.

Convey my cordial felicitations to Mrs. Field, and believe me ever, my dear Mr. Justice,

Your faithful friend,

JAMES C. WELLING.

Mr. Justice FIELD.

Letter from Right Rev. B. Wistar Morris, Episcopal  
Bishop of Oregon :

BISHOPCROFT, PORTLAND, OREGON,  
*August 22, 1889.*

MY DEAR JUDGE FIELD :

I hope a word of congratulation from your Oregon friends for your escape in the recent tragedy will not be considered an intrusion. Of course we have all been deeply interested in its history, and proud that you were found as you were, without the defenses of a bully.

I will not trespass further on your time than to subscribe myself,

Very truly your friend,

B. WISTAR MORRIS.

Mr. Justice FIELD.

A copy of the following card was enclosed in this letter :

AN UNARMED JUSTICE.

PORTLAND OREGON, *August 19.*

*To the Editor of the Oregonian :*

There is one circumstance in the history of the Field and Terry tragedy that seems to me is worthy of more emphatic comment than it has yet received. I mean the fact that Judge Field had about his person no weapon of defense whatever, though he knew that this miserable villain was dogging his steps for the purpose of assaulting him, perhaps of taking his life. His brother, Mr. Cyrus W. Field, says :

“It was common talk in the East here, among my brother’s friends, that Terry’s threats to do him bodily harm were made with the full intent to follow them up. Terry threatened openly to shoot the Justice, and we,



who knew him, were convinced he would certainly do it if he ever got a chance.

"I endeavored to dissuade my brother from making the trip West this year, but to no purpose, and he said, 'I have a duty to perform there, and this sort of thing can't frighten me away. I know Terry will do me harm if he gets a chance, and as I shall be in California some time, he will have chances enough. Let him take them.'

"When urged to arm himself he made the same reply. He said that when it came to such a pass in this country that judges find it necessary to go armed, it will be time to close the courts themselves."

This was a manly and noble reply and must recall to many minds that familiar sentiment: "He is thrice armed who has his quarrel just." With the daily and hourly knowledge that this assassin was ever upon his track, this brave judge goes about his duty and scorns to take to himself the defenses of a bully or a brigand; and in doing so, how immeasurably has he placed himself above the vile creature that sought his life, and all others who resort to deeds of violence. "They that take the sword shall perish with the sword," is a saying of wide application, and had it been so in this case; had this brave and self-possessed man been moved from his high purpose by the importunity of friends, and when slain by his enemy, had been found armed in like manner with the murderer himself, what a stain would it have been upon his name and honor? And how would our whole country have been disgraced in the eyes of the civilized world, that her highest ministers of justice must be armed as highwaymen as they go about their daily duties!

Well said this undaunted servant of the state: "Then will it be time to close the courts themselves." May we not hope, Mr. Editor, that this example of one occupying this high place in our country may have

some influence in staying the spirit and deeds of violence now so rife, and that they who are so ready to resort to the rifle and revolver may learn to regard them only as the instruments of the coward or the scoundrel ?

### B. WISTAR MORRIS.

The citations given below from different journals, published at the time, indicated the general opinion of the country. With rare exceptions it approved of the action of the Government, the conduct of Neagle, and the bearing of Justice Field.

The *Alta California*, a leading paper in California, had, on August 15, 1889, the day following the tragedy, the following article :

#### THE TERRY TRAGEDY.

The killing of David S. Terry by the United States Marshal David Neagle yesterday was an unfortunate affair, regretted, we believe, by no one more than by Justice Field, in whose defense the fatal shot was fired. There seems, however, to be an almost undivided sentiment that the killing was justifiable. Every circumstance attending the tragedy points to the irresistible conclusion that there was a premeditated determination on the part of Terry and his wife to provoke Justice Field to an encounter, in which Terry might either find an excuse for killing the man against whom he had threatened vengeance, or in which his wife might use the pistol which she always carries, in the pretended defense of her husband. For some time past it has been feared that a meeting between Terry and Justice Field would result in bloodshed. There is now indis-

putable proof that Terry had made repeated threats that he would assault Justice Field the first time he met him off the bench, and that if the Judge resisted he would kill him. Viewed in the light of these threats, Terry's presence on the same train with Justice Field will hardly be regarded as accidental, and his actions in the breakfast-room at Lathrop were directly in line with the intentions he had previously expressed. Neagle's prompt and deadly use of his revolver is to be judged with due reference to the character and known disposition of the man with whom he had to deal and to his previous actions and threats. He was attending Justice Field, against the will of the latter and in spite of his protest, in obedience to an order from the Attorney-General of the United States to Marshal Franks to detail a deputy to protect the person of Justice Field from Terry's threatened violence. A slap in the face may not, under ordinary circumstances, be sufficient provocation to justify the taking of human life; but it must be remembered that there were no ordinary circumstances and that Terry was no ordinary man. Terry was a noted pistol-shot; it was known that he invariably carried arms and that he boasted of his ability to use them. If on this occasion he was unarmed, as Mrs. Terry asserts,\* Neagle had no means of knowing that fact; on the contrary, to his mind every presumption was in favor of the belief that he carried both pistol and knife, in accordance with his usual habit. As a peace officer, even apart from the special duty which had been assigned to him, he was justified in taking the means necessary to prevent Terry from continuing his assault; but the means necessary in the case of one man may be wholly inadequate with a man bearing the reputation of David S. Terry, a man who only a few months previously had drawn a knife while resisting the lawful au-

---

\* It has been conclusively established since that he was armed with his usual bowie-knife at the time.

thority of another United States officer. It is true that if Terry was unarmed, the deputy marshal might have arrested him without taking his life or seriously endangering his own ; but Terry was a man of gigantic stature, and, though aged, in possession of a giant's strength ; and there is no one who was acquainted with him, or has had opportunity to learn his past history, who does not know that he was a desperate man, willing to take desperate chances and to resort to desperate means when giving way to his impulses of passion, and that any person who should at such a moment attempt to stay his hand would do so at the risk of his life. Whether he had a pistol with him at that moment or not, there was every reason to believe that he was armed, and that the blow with his hand was intended only as the precursor to a more deadly blow with a weapon. At such moments little time is allowed for reflection. The officer of the law was called upon to act and to act promptly. He did so, and the life of David S. Terry was the forfeit. He fell, a victim to his own ungovernable passions, urged on to his fate by the woman who was at once his wife and his client, and perhaps further incited by sensational newspaper articles which stirred up the memory of his resentment for fancied wrongs, and taunted him with the humiliation of threats unfulfilled.

The close of Judge Terry's life ends a career and an era. He had the misfortune to carry into a ripened state of society the conditions which are tolerable only where social order is not fully established. Restless under authority, and putting violence above law, he lived by the sword and has perished by it.

That example which refused submission to judicial finalities was becoming offensive to California, but the incubus of physical fear was upon many who realized that the survival of frontier ways into non-frontier period was a damage to the State. But, be this as it

may, the stubborn spirit that defied the law has fallen by the law.

When Justice Field showed the highest judicial courage in the opening incidents of the tragedy that has now closed, the manhood of California received a distinct impetus. When the Justice, with threats made against his life, returned to the State unarmed, and resentful of protection against assault, declaring that when judges must arm to defend themselves from assault offered in reprisal of their judicial actions society must be considered dissolved, he was rendering to our institutions the final and highest possible service. The event that followed, the killing of Terry in the act of striking him the second time from behind, while he sat at table in a crowded public dining-room, was the act of the law. The Federal Department of Justice, by its chief, the Attorney-General of the United States, had ordered its officer, the United States marshal for the northern district of California, to take such means and such measures as might be necessary to protect the persons of the judges against assault by Judge Terry, in carrying out the threats that he had made. This order was from the executive arm of the Government, and it was carried out to the letter. Judge Terry took the law into his own hands and fell. Nothing can add to the lesson his fate teaches. It is established now that in California no man is above the law ; that no man can affect the even poise of justice by fear. Confiding in his own strength as superior to the law, David S. Terry fell wretchedly.

No more need be said. New California inscribes upon her shield, "Obedience to the law the first condition of good citizenship," and the past is closed.

*The Record-Union* of Sacramento, one of the leading papers of California, on August 15, 1889, the day fol-



lowing the tragedy, had the following article under the head—

#### KILLING OF JUDGE TERRY.

In the news columns of the *Record-Union* will be found all the essential details of the circumstances of the killing of D. S. Terry. It will be evident to the reader that they readily sap the whole case, and that there is no substantial dispute possible concerning the facts. These truths we assert, without fear of successful contradiction, establish the justifiableness of the act of the United States marshal who fired upon and killed Terry. We think there will be no dispute among sensible men that a federal circuit judge or a justice of the supreme bench, passing from one portion of the circuit to another in which either is required to open a court and hear causes, and for the purpose of fully discharging his official duties, is while en route in the discharge of an official function, and constructively his court is open to the extent that an assault upon him, because of matters pending in his court, or because of judgments he has rendered or is to render, is an assault upon the court, and his bailiff or marshal detailed to attend the court or to aid in preserving the order and dignity of the court has the same right to protect him from assault then that he would have, had the judge actually reached his court-room.

But further than this, we hold that in view of the undeniable fact that the Justice had knowledge of the fact that the Terrys, man and wife, had sworn to punish him; that they had indulged in threats against him of the most pronounced character; that they had boarded a train on which it is probable they knew he had taken passage from one part of his circuit to another in his capacity as a magistrate; in view of the fact that Terry sought the first opportunity to approach and strike him, and that, too, when seated; and in view



of the notorious fact that Terry always went armed—the man who shot Terry would have been justified in doing so had he not even been commissioned as an officer of the court. He warned the assailant to desist, and knowing his custom to go armed, and that he had threatened the Justice, and Terry refusing to restrain his blows, it was Neagle's duty to save life, to strike down the assailant in the most effectual manner. Men who, having the ability to prevent murder, stand by and see it committed, may well be held to accountability for criminal negligence.

But in this case it is clear that murder was intended on the part of the Terrys. One of them ran for her pistol and brought it, and would have reached the other's side with it in time, had she not been detained by strong men at the door. Neagle saw this woman depart, and coupling it with the advance of Terry, knew, as a matter of course, what it meant. He had been deputed by the chief law officer of the Government—in view of previous assaults by the Terrys and their threats and display of weapons in court—to stand guard over the judges and protect them. He acted, therefore, precisely as it was proper he should do. Had he been less prompt and vigorous, all the world knows that not he but Terry would to-day be in custody, and not Terry but the venerable justice of the Supreme Court of the United States would to-day be in the coffin.

These remarks have grown too extended for any elaboration of the moral of the tragedy that culminated in the killing of David S. Terry yesterday. But we cannot allow the subject to be even temporarily dismissed without calling the thought of the reader to contemplation of the essential truth that society is bound to protect the judges of the courts of the land from violence and the threats of violence; otherwise the decisions of our courts must conform to the vio-

lence threatened, and there will be an end of our judicial system, the third and most valuable factor in the scheme of representative government. Society cannot, therefore, punish, but must applaud the man who defends the courts of the people and the judges of those courts from such violence and threats of violence. For it must be apparent to even the dullest intellect that all such violence is an outrage upon the judicial conscience, and therefore involves and puts in peril the liberties of the people.

The New Orleans *Times-Democrat*, in one of its issues at this period, used the following language :

The judge in America who keeps his official ermine spotless, who faithfully attends to the heavy and responsible duties of his station, deserves that the people should guard the sanctity of his person with a strength stronger than armor of steel and readier than the stroke of lance or sword. Though the judges be called to pass on tens of thousands of cases, to sentence to imprisonment or to death thousands of criminals, they should be held by the people safe from the hate and vengeance of those criminals as if they were guarded by an invulnerable shield.

If Judge Field, of the Supreme Court, one of the nine highest judges under our republican government, in travelling recently over his circuit in California, had been left to the mercy of the violent man who had repeatedly threatened his life, who had proved himself ready with the deadly knife or revolver, it would have been a disgrace to American civilization ; it would have been a stigma and stain upon American manhood ; it would have shown that the spirit of American liberty, which exalts and pays reverence to our judiciary, had been replaced by a public apathy that marked the beginning of the decline of patriotism.

Judge Field recognized this when, in being advised to arm himself in case his life was endangered, he uttered the noble words: "No, sir; I do not and will not carry arms, for when it is known that the judges of the court are compelled to arm themselves against assaults offered in consequence of their judicial action it will be time to dissolve the courts, consider the government a failure, and let society lapse into barbarism." That ringing sentence has gone to the remotest corner of the land, and everywhere it has gone it should fire the American heart with a proud resolve to protect forever the sanctity of our judiciary.

Had not Neagle protected the person of Judge Field from the assault of a dangerous and violent ruffian, apparently intent on murder, by his prompt and decisive action, shooting the assailant down to his death, it is certain that other brave men would have rushed quickly to his rescue; but Neagle's marvelous quickness forestalled the need of any other's action. The person of one of the very highest American judges was preserved unharmed, while death palsied the murderous hand that had sworn to take his life.

That act of Neagle's was no crime. It was a deed that any and every American should feel proud of having done. It was an act that should be applauded over the length and breadth of this great land. It should not have consigned him for one minute to prison walls. It should have lifted him high in the esteem of all the American people. When criminals turn executioners, and judges are the victims, we might as well close our courts and hoist the red flag of anarchy over their silent halls and darkened chambers.

The New York *Herald*, in its issue of August 19, 1889, said:

The sensation of the past week is a lesson in republicanism and a eulogium on the majesty of the law.

It was not a personal controversy between Stephen J. Field and David S. Terry. It was a conflict between law and lawlessness—between a judicial officer who represented the law and a man who sought to take it into his own hands. One embodied the peaceful power of the nation, the will of the people; the other defied that power and appealed to the dagger.

Justice Field's whole course shows a conception of judicial duty that lends grandeur to a republican judiciary. It is an inspiring example to the citizens and especially to the judges of the country. He was reminded of the danger of returning to California while Judge Terry and his wife were at large. His firm answer was that it was his duty to go and he would go. He was then advised to arm himself for self-defense. His reply embodies a nobility that should make it historic: "When it comes to such a pass in this country that judges of the courts find it necessary to go armed it will be time to close the courts themselves."

This sentiment was not born of any insensibility to danger; Justice Field fully realized the peril himself. But above all feeling of personal concern arose a lofty sense of the duty imposed upon a justice of the nation's highest court. The officer is a representative of the law—a minister of peace. He should show by his example that the law is supreme; that all must bow to its authority; that all lawlessness must yield to it. When judges who represent the law resort to violence even in self-defense, the pistol instead of the court becomes the arbiter of controversies, and the authority of the government gives way to the power of the mob.

Rather than set a precedent that might tend to such a result, that would shake popular confidence in the judiciary, that would lend any encouragement to violence, a judge, as Justice Field evidently felt, may well risk his own life for the welfare of the commonwealth. He did not even favor the proposition that a marshal be detailed to guard him.



The course of the venerable Justice is an example to all who would have the law respected. It is also a lesson to all who would take the law into their own hands.

Not less exemplary was his recognition of the supremacy of the law when the sheriff of San Joaquin appeared before him with a warrant of arrest on the grave charge of murder. The warrant was an outrage, but it was the duty of the officer to serve it, even on a justice of the United States Supreme Court. When the sheriff hesitated and began to apologize before discharging his painful duty, Justice Field promptly spoke out: "Officer, proceed with your duty. I am ready, and an officer should always do his duty." These are traits of judicial heroism worthy the admiration of the world.

The *Albany Evening Union*, in one of its issues at this time, has the following:

#### JUSTICE FIELD RELIES UPON THE LAW FOR HIS DEFENSE.

The courage of Justice Stephen J. Field in declining to carry weapons and declaring that it is time to close the courts when judges have to arm themselves, and at the same time proceeding to do his duty on the bench when his life was threatened by a desperate man, is without parallel in the history of our judiciary. We do not mean by this that he is the only judge on the bench that would be as brave as he was under the circumstances, but every phase of the affair points to the heroism of the man. He upheld the majesty of the law in a fearless manner and at the peril of his life. He would not permit the judiciary to be lowered by any fear of the personal harm that might follow a straightforward performance of his duty. His arrest for com-

plicity in a murder was borne by the same tranquil bravery—a supreme reliance upon a due process of law. He did not want the officer to apologize to him for doing his duty. He had imprisoned Judge Terry and his wife Sarah Althea for contempt of court. \* \* \* The threats by Judge Terry did not even frighten him to carry weapons of self-defense. This illustration of upholding the majesty of the law is without precedent, and is worth more to the cause of justice than the entire United States army could be if called out to suppress a riotous band of law-breakers. Justice Field did what any justice should do under the circumstances, but how many judges would have displayed a like courage had they been in his place?

The *New York World*, in its issue of Monday evening, August 26th, has the following article:

#### A NEW LEAF TURNED.

When Judge Field, knowing that his life was threatened, went back unarmed into the State of California and about his business there, he gave wholesome rebuke to the cowardice that prompts men to carry a pistol—a cowardice that has been too long popular on the coast. He did a priceless service to the cause of progress in his State, and added grace to his ermine when he disdained to take arms in answer to the threats of assassins.

The men who have conspired to take Judge Field's life ought to need only one warning that a new day has dawned in California, and to find that warning in the doom of the bully Terry. The law will protect the ermine of its judges.

The *New York World* of August 18th treats of the arrest of Justice Field as an outrage, and speaks of it as follows:

THE ARREST OF FIELD AN OUTRAGE AND AN  
ABSURDITY.

The California magistrate who issued a warrant for Justice Field's arrest is obviously a donkey of the most precious quality. The Justice had been brutally assailed by a notorious ruffian who had publicly declared his intention to kill his enemy. Before Justice Field could even rise from his chair a neat-handed deputy United States marshal shot the ruffian. Justice Field had no more to do with the shooting than any other bystander, and even if there had been doubt on that point it was certain that a justice of the United States Supreme Court was not going to run away beyond the jurisdiction. His arrest was, therefore, as absurd as it was outrageous. It was asked for by the demented widow of the dead desperado simply as a means of subjecting the Justice to an indignity, and no magistrate possessed of even a protoplasmic possibility of common sense and character would have lent himself in that way to such a service.

The Kansas City *Times*, in its issue at this period, uses the following language :

NO ONE WILL CENSURE.

---

*Gratitude for Judge Field's Escape the Chief Sentiment.*

---

Deputy Marshal Neagle acted with terrible promptitude in protecting the venerable member of the Supreme Court with whose safety he was specially charged, but few will be inclined to censure him. He had to deal with a man of fierce temper, whose readiness to use firearms was part of the best known history of California.

It is a subject for general congratulation that Justice Field escaped the violence of his assailant. The American nation would be shocked to learn that a judge of its highest tribunal could not travel without danger of assault from those whom he had been compelled to offend by administering the laws. Justice Field has the respect due his office and that deeper and more significant reverence produced by his character and abilities. Since most of the present generation were old enough to observe public affairs he has been a jurist of national reputation and a sitting member of the Supreme Court. In that capacity he has earned the gratitude of his countrymen by bold and unanswerable defense of sound constitutional interpretation on more than one occasion. In all the sad affair the most prominent feeling will be that of gratitude at his escape.

*The Army and Navy Journal*, in its issue of August 24, 1889, had the following article under the head of—

#### MARSHAL NEAGLE'S CRIME.

The public mind appears to be somewhat unsettled upon the question of the right of Neagle to kill Terry while assaulting Judge Field. His justification is as clear as is the benefit of his act to a long-suffering community. Judge Field was assaulted unexpectedly from behind, while seated at a dining-table, by a notorious assassin and ruffian, who had sworn to kill him, and who, according to the testimony of at least one witness, was armed with a long knife, had sent his wife for a pistol, and was intending to use it as soon as obtained.

\* \* \*

The rule is that the danger which justifies homicide in self-defense must be actual and urgent. And was it not so in this case? No one who reflects upon the features of the case—an old man without means of de-

fense, fastened in a sitting posture by the table at which he sat and the chair he occupied, already smitten with one severe blow and about to receive another more severe from a notorious ruffian who had publicly avowed his intention to slay him—no one surely can deny that the peril threatening Judge Field was both actual and urgent in the very highest degree.

“A man may repel force by force in the defense of his person, habitation, or property, against one or many who manifestly intend and endeavor by violence or surprise to commit a known felony on either.” “In such a case he is not obliged to retreat, but may pursue his adversary till he find himself out of danger; and if in a conflict between them he happens to kill, such killing is justifiable. The right of self-defense in case of this kind is founded on the law of nature, and is not, nor can be, superseded by any law of society. Where a known felony is attempted upon the person, be it to rob or murder, the party assaulted may repel force by force; and even his servant attendant on him, or any person present, may interpose for preventing mischief, and, if death ensue, the party interposing will be justified.” (Wharton Amer. Crim. Law, Vol. 2, Sec. 1019.)

This is the law, as recognized at the present day and established by centuries of precedent, and it completely exonerates Neagle—of course Judge Field needs no exoneration—from any, the least, criminality in what he did. He is acquitted of wrong-doing, not only in his character of attendant servant, but in that of bystander simply. He was as much bound to kill Terry under the circumstances as every bystander in the room was bound to kill him; and in his capacity of guard, especially appointed to defend an invaluable life against a known and imminent felony, he was so bound in a much greater degree.

“A sincere and apparently well-grounded belief that



a felony is about to be perpetrated will extenuate a homicide committed in prevention of it, though the defendant be but a private citizen" (25 Ala., 15.) See Wharton, above quoted, who embodies the doctrine in his text (Vol. 2, Sec. 1039).

\* \* \* \* \*

Let us be grateful from our hearts that the old Mosaic law, "Whoso sheddeth man's blood by man shall his blood be shed," is shown by this memorable event to have not yet fallen altogether into innocuous desuetude; and let us give thanks to God that he has seen fit on this occasion to preserve from death at the hands of an intolerable ruffian the life of that high-minded, pure-handed, and excellent jurist and magistrate, Stephen J. Field.

The Philadelphia *Times* of August 15th has the following:

ONLY ONE OPINION.

---

*Marshal Neagle Could Not Stand Idly By.*

---

The killing of Judge Terry of California is a homicide that will occasion no regret wherever the story of his stormy and wicked life is known. At the same time, the circumstances that surrounded it will be deeply lamented. This violent man, more than once a murderer, met his death while in the act of assaulting Justice Field of the Supreme Court of the United States. Had he not been killed when he was, Judge Field would probably have been another of his victims. Terry had declared his purpose of killing the Justice, and this was their first meeting since his release from deserved imprisonment.

In regard to the act of United States Marshal Neagle, there can be only one opinion. He could not stand

idly by and see a judge of the Supreme Court murdered before his eyes. The contumely that Terry sought to put upon the Judge was only the insult that was to go before premeditated murder. The case has no moral except the certainty that a violent life will end in a violent death.

The *Philadelphia Inquirer* of the same date says as follows :

A PREMEDITATED INSULT.

---

*Followed Quickly by a Deserved Retribution.*

---

Ex-Judge Terry's violent death was a fitting termination to a stormy life, and the incidents of his last encounter were characteristic of the man and his methods. He was one of the few lingering representatives of the old-time population of California. He was prominent there when society was organizing itself, and succeeded in holding on to life and position when many a better man succumbed to the rude justice of the period. Most of his early associates died with their boots on, a generation ago. Terry lived, assailed on all sides, despised by the better element and opposed by the law, in trouble often, but never punished as he deserved. His last act was to offer a gross, premeditated insult to the venerable Justice Field, and the retribution he had long defied followed it quickly. California will have little reason to mourn his loss.

The *Cleveland Leader*, in its issue of August 18th, speaks of the conduct of Neagle as follows :

THE KILLING OF TERRY.

We have already expressed the opinion in these columns that the killing of David S. Terry by Deputy

Marshal Neagle at Lathrop, California, Wednesday, was entirely justifiable. In that opinion it is a pleasure to note that the press of the country concur almost unanimously. The judgment of eminent members of the legal profession, as published in our telegraph columns and elsewhere, support and bear out that view of the case. The full account of the trouble makes the necessity of some such action on the part of the deputy marshal clear. The judgment of the country is that Neagle only did his duty in defending the person of Justice Field, and in that judgment the California jury will doubtless concur when the case is brought before it.

The *Argonaut*, a leading paper of San Francisco, not a political, but a literary paper, and edited with great ability, in its issue of August 26, 1889, used the following language :

The course of Judge Field throughout this troublesome business has been in the highest degree creditable to him. He has acted with dignity and courage, and his conduct has been characterized by most excellent taste. His answer, when requested to go armed against the assault of Terry, is worthy of preservation. And now that his assailant has been arrested in his career by death, all honest men who respect the law will breathe more freely. Judge Terry had gained a most questionable reputation, not for courage in the right direction ; not for generosity which overlooked or forgave, or forgot offenses against himself or his interests. He never conceded the right to any man to hold an opinion in opposition to his prejudices, or cross the path of his passion with impunity. He could with vulgar whisper insult the judge who rendered an opinion adverse to his client, and with profane language insult the attorney who

had the misfortune to be retained by a man whose cause he did not champion. He had become a terror to society and a walking menace to the social circle in which he revolved. His death was a necessity, and, except here and there a friend of blunted moral instincts, there will be found but few to mourn his death or criticise the manner of his taking off. To say that Marshal Neagle should have acted in any other manner than he did means that he was to have left Justice Field in the claws of a tiger, and at the mercy of an infuriated, angry monster, who had never shown mercy or generosity to an enemy in his power. \* \* \*

Judge Field has survived the unhappy conflict which carried Judge Terry to his grave. He is more highly honored now than when this quarrel was thrust upon him ; he has lost no friends ; he has made thousands of new ones who honor him for protecting with his life the honor of the American bench, the dignity of the American law, and the credit of the American name. In the home where Judge Terry lived he went to the grave almost unattended by the friends of his social surroundings, no clergyman consenting to read the service at his burial. The Supreme Court over which he had presided as chief justice refused to adjourn in honor of his death, the press and public opinion, for a wonder, in accord over the manner of his taking off.

Indeed, the public opinion of the country, as shown by the press and declarations of prominent individuals, was substantially one in its approval of the action of the Government, the conduct of Neagle, and the bearing of Justice Field.\*

---

\* NOTE.—Whilst there was a general concurrence of opinion as to the threats of Terry and of the fate he met at the hands of Neagle

The *Daily Report*, a paper of influence in San Francisco at the time, published the following article on "The Lesson of the Hour," from the pen of an eminent lawyer of California, who was in no way connected with the controversy which resulted in Judge Terry's death :

The universal acquiescence of public opinion in the justifiable character of the act which terminated the life of the late David S. Terry is to be accounted for by the peculiar nature of the offense which he had committed. It was not for a mere assault, though per-

---

and of the bearing of Justice Field through all the proceedings, there were exceptions to this judgment. There were persons who sympathized with Terry and his associates and grieved at his fate, although he had openly avowed his intention not merely to insult judicial officers for their judicial conduct, but to kill them in case they resented the insult offered. He married Sarah Althea Hill after the United States Circuit Court had delivered its opinion, in open court, announcing its decision that she had committed forgery, perjury, and subornation of perjury, and was a woman of abandoned character. And yet a writer in the *Overland Monthly* in October, 1889, attributes his assault upon the marshal—striking him violently in the face for the execution of the order of the court to remove her from the courtroom because of her gross imputation upon the judges—chiefly to his chivalric spirit to protect his wife, and declares that "the universal verdict" upon him "will be that he was possessed of *sterling integrity of purpose*, and stood out from the rest of his race as a strongly individualized character, which has been well called an anachronism in our civilization." And Governor Pennoyer, of Oregon, in his message to the legislature of that State, pronounced the officer appointed by the marshal under the direction of the Attorney-General to protect Justices Field and Sawyer from threatened violence and murder as a "*secret armed assassin*," who accompanied a Federal judge in California, and who shot down in cold blood an unarmed citizen of that State.



petrated under circumstances which rendered it peculiarly reprehensible, that he met his death without eliciting from the community one word of condemnation for the slayer or of sympathy with the slain.

Mr. Justice Field is an officer of high rank in the most important department of the Government of the United States, namely, that which is charged with the administration of legal justice. When David S. Terry publicly and ostentatiously slapped the face of this high official—this representative of public justice—the blow being in all probability the intended prelude to a still more atrocious offense, he committed a gross violation of the peace and dignity of the United States. The echo of the blow made the blood tingle in the veins of every true American, and from every quarter, far and near, thick and fast, came denunciations of the outrage. That any man under a government created “by the people, for the people” shall assume to be a law unto himself, the sole despot in a community based on the idea of the equality of all before the law, and the willing submission and obedience of all to established rule, is simply intolerable.

In his audacious assault on “the powers that be” Terry took his life in his hand, and no lover of peace and good order can regret that, of the two lives in peril, his was extinguished. He threw down the gage of battle to the whole community, and it is well that he was vanquished in the strife.

In the early part of the war of the rebellion General Dix, of New York, was placed in charge of one of the disaffected districts. We had then hardly begun to see that war was a very stern condition of things, and that it actually involved the necessity of killing. Those familiar with the incidents of that time will remember how the General’s celebrated order, “If any one attempts to haul down the American flag, shoot him on the spot,” thrilled the slow pulses of the Northern heart

like the blast of a bugle. Yet some adverse obstructionist might object that the punishment pronounced far exceeded the offense, which was merely the effort to detach from its position a piece of colored bunting. But it is the *animus* that characterizes the act. An insult offered to a mere symbol of authority becomes, under critical circumstances, an unpardonable crime. If the symbol, instead of being an inanimate object, be a human being—a high officer of the Government—does not such an outrage as that committed by Terry exceed in enormity the offense denounced by General Dix? And if so, why should the punishment be less?

In every civilized community, society, acting with a keen instinct of self-preservation, has always punished with just severity those capital offenders against peace and good order who strike at the very foundation on which all government must rest.

## CHAPTER XX.

### THE APPEAL TO THE SUPREME COURT OF THE UNITED STATES, AND THE SECOND TRIAL OF SARAH ALTHEA'S DIVORCE CASE.

With the discharge from arrest of the brave deputy marshal, Neagle, who had stood between Justice Field and the would-be assassin's assault, and the vindication by the Circuit Court of the right of the general government to protect its officers from personal violence, for the discharge of their duties, at the hands of disappointed litigants, the public mind, which had been greatly excited by the proceedings narrated, became quieted. No apprehension was felt that there would be any reversal of the decision of the Circuit Court on the appeal which was taken to the Supreme Court. General and absolute confidence was expressed in the determination of the highest tribunal of the nation. The appeal was argued on the part of Neagle by the Attorney-General of the United States and Joseph H. Choate, Esq., of the New York bar ; and the briefs of counsel in the Circuit Court were also filed. The attorney-general of California and Mr. Zachariah Montgomery appeared upon behalf of the State, and briefs of Messrs. Shellabarger and Wilson were also filed in its behalf.

.

The argument of the Attorney-General of the United States was exceedingly able. He had watched all the proceedings of the case from the outset. He had directed that protection should be extended by the marshal to Justice Field and Judge Sawyer against any threatened violence, and he believed strongly in the doctrine that the officers of the general government were entitled to receive everywhere throughout the country full protection against all violence whilst in the discharge of their duties. He believed that such protection was necessary to the efficiency and permanency of the government ; and its necessity in both respects was never more ably presented.

The argument of Mr. Choate covered all the questions of law and fact in the case and was marked by that great ability and invincible logic and by that clearness and precision of statement which have rendered him one of the ablest of advocates and jurists in the country, one who all acknowledge has few peers and no superiors at the bar of the nation.\*

---

\* NOTE.—Mr. Choate took great interest in the question involved—the right of the Government of the United States to protect its officers from violence whilst engaged in the discharge of their duties,—deeming its maintenance essential to the efficiency of the Government itself ; and he declined to make any charge or take any fee for his professional services in the case. The privilege of supporting this great principle before the highest tribunal of the country, where his powers would be most effectively engaged in securing its recognition, was considered by him as sufficient reward. Certainly he has that reward in the full establishment of that principle—for which, also,

The argument of the attorney-general of the State consisted chiefly of a repetition of the doctrine that, for offenses committed within its limits, the State alone has jurisdiction to try the offenders—a position which within its proper limits, and when not carried to the protection of resistance to the authority of the United States, has never been questioned.

The most striking feature of the argument on behalf of the State was presented by Zachariah Montgomery. It may interest the reader to observe the true Terry flavor introduced into his argument, and the manifest perversion of the facts into which it led him. He deeply sympathized with Terry in the grief and mortification which he suffered in being charged with having assaulted the marshal with a deadly weapon in the presence of the Circuit Court in September, 1888. He attempted to convince the Supreme Court that one of its members had deliberately made a misrecital, in the order committing Terry for contempt, and treated this as a mitigation of that individual's subsequent attack on Justice Field. He did not, however, attempt to

---

both he and Attorney-General Miller will receive the thanks of all who love and revere our national government and trust that its existence may be perpetuated.

Mr. James C. Carter, the distinguished advocate of New York, also took a deep interest in the questions involved, and had several consultations with Mr. Choate upon them; and his professional services were given with the same generous and noble spirit that characterized the course of Mr. Choate.



gainsay the testimony of the numerous witnesses who swore that Terry did try to draw his knife while yet in the court-room on that occasion, and that, being temporarily prevented from doing so by force, he completed the act as soon as this force was withdrawn, and pursued the marshal with knife in hand, loudly declaring in the hearing of the court, in language too coarse and vulgar to be repeated, that he would do sundry terrible things to those who should obstruct him on his way to his wife. As she was then in the custody of the marshal and in his office, under an order of the court; and as Terry had resisted her arrest and removal from the court-room until overpowered by several strong men, and as he had instantly on being released rushed madly from the court-room, drawing and brandishing his knife as he went, the conclusion is irresistible that he was determined upon her rescue from the marshal, if, with the aid of his knife, he could accomplish it. That Mr. Montgomery allowed these facts, which constitute the offense of an assault with a deadly weapon, to go unchallenged, compels us to the charitable presumption that he did not know the law.

A reading of the decisions on this subject would have taught him that in order to constitute that offense it is not necessary that the assailant should actually stab with his knife or shoot with his pistol. The assault by Terry was commenced in the court-room,

under the eyes of the judges, and was a continuing act, ending only with the wrenching of the knife from his hands. It was all committed "in the presence of the court," for the Supreme Court has decided in the Savin case that "the jury-room and hallway were parts of the place in which the court was required by law to hold its sessions, and that the court, at least when in session, is present in every part of the place set apart for its own use and for the use of its officers, jurors, and witnesses, and that misbehavior in such a place is misbehavior in the presence of the court. (See vol. 131, U. S. Reports, page 277, where the case is reported.)

Mr. Montgomery was reckless enough to contradict the record when he stated that Justice Field in his opinion in the revivor case "took occasion to discuss at considerable length the question of the genuineness of the aforesaid marriage document, maintaining very strenuously that it was a forgery, and that this it was that so aroused the indignation of Mrs. Terry that she sprang to her feet and charged Justice Field with having been bought."

There is not a word of truth in this statement. Justice Field, in overruling the demurrer, never discussed at all the genuineness of the marriage agreement. How, then, could it be true that words, nowhere to be found in Judge Field's opinion, "so aroused the indignation of Mrs. Terry that she sprang to her feet

and charged Justice Field with having been bought"? Justice Field discussed only the legal effect of the decree already rendered by the United States Circuit Court. He said nothing to excite the woman's ire, except to state the necessary steps to be taken to enforce the decree. He had not participated in the trial of the original case, and had never been called upon to express any opinion concerning the agreement. Mr. Montgomery said in his brief that the opinion read by Justice Field, "while overruling a demurrer, assails this contract, in effect pronouncing it a forgery." This statement is totally unfounded. From it the casual reader would suppose that the demurrer was to the complaint in the original case, and that the court was forestalling evidence, whereas it was a demurrer in a proceeding to revive the suit, which had abated by the death of the party, and to give effect to the decree already rendered therein, after a full hearing of the testimony.

Mr. Montgomery said :

"The opinion also charges Mrs. Terry with perjury, after she has sworn that it was genuine."

The judgment of a court may be referred to by one of its judges, even though the rendering of the judgment convicted a party or a witness, of perjury, without furnishing the perjurer with a justification for

denouncing the judge. Mr. Montgomery furthermore said that the "opinion charged her not only with forgery and perjury, but with unchastity as well; for if she had not been Sharon's wife, she had unquestionably been his kept mistress." He says:

"At the announcement of this decision from the bench in the presence of a crowded court-room; a decision which she well knew, before the going down of another sun, would be telegraphed to the remotest corners of the civilized world, to be printed and reprinted with sensational head-lines in every newspaper, and talked over by every scandal-monger on the face of the earth; was it any wonder—not that it was right—but was it any wonder that this high-spirited, educated woman, sprung from as respectable a family as any in the great State of Missouri, proud of her ancestry, and prizing her good name above everything on this earth, when she heard herself thus adjudged in one breath to be guilty of forgery, perjury, and unchastity, and thus degraded from the exalted position of wife—to which the Supreme Court of her State had said she was entitled—down to that of a paid harlot; was it any wonder, I say, that like an enraged tigress she sprang to her feet, and in words of indignation sought to defend her wounded honor?"

Mr. Montgomery did not speak truly when he said that on this occasion such a decision was announced from the bench. The decision was announced on the 24th of December, 1885, nearly three years before. The only decision announced on this occasion was that the case did not die with the plaintiff therein—William

Sharon—but that the executor of his estate had the right to act—had a right to be substituted for the deceased, and to have the decree executed just as it would have been if Mr. Sharon had lived. It was amazing effrontery and disregard of the truth on the part of Mr. Montgomery to make such a statement as he did to the Supreme Court, when the record, lying open before them, virtually contradicted what he was saying.

Towards the close of the decision Justice Field did make reference to Mrs. Terry's testimony in the Superior Court. He said that in the argument some stress had been laid upon the fact that in a State court, where the judge had decided in Mrs. Terry's favor, the witnesses had been examined in open court, where their bearing could be observed by the judge; while in the federal court the testimony had been taken before an examiner, and the court had not the advantage of hearing and seeing the witnesses. In reply to this Justice Field called attention to the fact that Judge Sullivan, while rendering his decision in favor of Mrs. Terry, had accused her of having wilfully perjured herself in several instances while testifying in her own case, and of having suborned perjury, and of having knowingly offered in evidence a forged document. But this reference to Judge Sullivan's accusations against Mrs. Terry was not reached in the reading of Justice





Field's opinion until nearly an hour after Mrs. Terry had been forcibly removed from the court-room for contempt, and therefore she did not hear it. This fact appears on record in the contempt proceedings.

But the most extraordinary feature of Mr. Montgomery's brief is yet to be noticed. He says that "If the assault so made by Judge Terry was not for the purpose of then and there killing or seriously injuring the party assaulted, but for the purpose of provoking him into a duel, then the killing of the assailant for such an assault was a crime."

And again he says :

"I have said that if the purpose of Judge Terry's assault upon Field was for the purpose of killing him then and there, Neagle, and not Neagle only, but anybody else, would have been justifiable in killing Terry to save the life of Field ; but that if Terry's object in assaulting Field was not then and there to kill or otherwise greatly injure him, but to draw him into a duel, then such an assault was not sufficient to justify the killing."

He then proceeds to speak of Judge Terry's duel with Senator Broderick, in which the latter was killed. He refers to many eminent citizens who have fought duels, although he admits that dueling is a sin. He then explains that "as a rule the duelist who considers himself wronged by another, having the position and standing of a gentleman, tenders him an insult, either

by a slap in the face or otherwise, in order to attract a challenge. Such undoubtedly was Terry's purpose in this case. All of Terry's threats point precisely to that."

Here Mr. Montgomery seems to be in accord with Sarah Althea Terry, who, as we have seen, stated that "Judge Terry intended to take out his satisfaction in slaps." In the same direction is the declaration of Porter Ashe, when he said :

"Instant death is a severe punishment for slapping a man on the face. I have no suspicion that Terry meant to kill Field or to do him further harm than to humiliate him."

And also that of Mr. Baggett, one of Terry's counsel, who said :

"I have had frequent conversations with Terry about Field, and he has often told me that Field has used his court and his power as a judge to humiliate him, and that he intended to humiliate him in return to the extent of his power. 'I will slap his face,' said Terry to me, 'if I run across him, but I shall not put myself out of the way to meet him. I do not intend to kill him, but I will insult him by slapping his face, knowing that he will not resent it.'"

What knightly courage was here. If ever a new edition of the dueling code is printed, it should have for a frontispiece a cut representing the stalwart Terry dealing stealthy blows from behind upon a justice of

the United States Supreme Court, 72 years of age, after having previously informed a trusted friend that he believed himself safe from any resistance by the object of his attack. It may be here also said that Justice Field, as was well known to every one, had for many years suffered from great lameness in consequence of an injury received by him in early life, and with difficulty could walk without assistance.

Mr. Montgomery, with freezing candor, informs the Supreme Court that, in strict accordance with the chivalrous code of honor, Judge Terry administered blows upon a member of that court, to force him into a duel, because of a judicial act with which he was displeased.

He says :

“The most conclusive proof that Terry had no intention, for the time being, of seriously hurting Field, but that his sole purpose was to tender him an insult, is found in the fact that he only used his open hand, and that, too, in a mild manner.”

We often hear of the “mild-mannered men” who “scuttle ships” and “cut throats,” but this is the very first one whose “very mild manner” of beating a justice of the Supreme Court of the United States with his hand was ever certified to by an attorney and counselor of that court in the argument of a case before it.

It would be difficult to conceive of anything more puerile or absurd than this pretense that Terry had the

slightest expectation of provoking a man of Justice Field's age, official position, and physical condition, to fight a duel with him in vindication of the right of the court over which he presided to imprison a man for contempt for beating the marshal in the face with his fist, and afterwards pursuing him with a knife, in the presence of the court, for obeying an order of the court.

Mr. Montgomery appears to have been imported into the case mainly for the purpose of reviewing the facts and giving them the Terry stamp. His ambition seems to have been to insult Justice Field and his associates in the Circuit Court by charging them with misrepresenting the facts of the occurrence, thus repeating Terry's reckless accusations to that effect. For Terry he had only words of eulogy and admiration, and said he was "straightforward, candid, and incapable of concealment or treachery himself, and therefore never suspected treachery, even in an enemy."

These noble qualities Terry had illustrated by assaulting Justice Field from behind while the latter was in a position which placed him entirely at the mercy of his assailant.

Montgomery thought that not only Neagle, but the President, Attorney-General, district attorney, and Marshal Franks should be arraigned for Terry's murder.

Although Justice Field had expressly advised the marshal that it was unnecessary for anybody to accompany him to Los Angeles, and although Neagle went contrary to his wish, and only because the marshal considered himself instructed by the Attorney-General to send him, yet Mr. Montgomery especially demanded that he (Justice Field) should be tried for Terry's homicide. This, too, in the face of the fact that under instructions from the attorney-general of the State of California, aroused to his duty by the Governor, the false, malicious, and infamous charge made against Justice Field by Sarah Althea Terry was dismissed by the magistrate who had entertained it, on the ground that it was manifestly destitute of the shadow of a foundation, and that any further proceedings against him would be "a burning disgrace to the State."

The decision of the Circuit Court discharging Neagle from the custody of the sheriff of San Joaquin county was affirmed by the Supreme court of the United States on the 14th of April, 1890. Justice Field did not sit at the hearing of the case, and took no part in its decision, nor did he remain in the conference room with his associate justices at any time while it was being considered or on the bench when it was delivered. The opinion of the Court was delivered by Justice Miller. Dissenting opinions were filed by Chief Justice Fuller and Justice Lamar. Justice Miller's opinion concludes as follows :



“We have thus given, in this case, a most attentive consideration to all the questions of law and fact which we have thought to be properly involved in it. We have felt it to be our duty to examine into the facts with a completeness justified by the importance of the case, as well as from the duty imposed upon us by the statute, which we think requires of us to place ourselves, as far as possible, in the place of the Circuit Court and to examine the testimony and the arguments in it, and to dispose of the party as law and justice require.

“The result at which we have arrived upon this examination is, that in the protection of the person and the life of Mr. Justice Field, while in the discharge of his official duties, Neagle was authorized to resist the attack of Terry upon him ; that Neagle was correct in the belief that without prompt action on his part the assault of Terry upon the Judge would have ended in the death of the latter ; that such being his well-founded belief, he was justified in taking the life of Terry, as the only means of preventing the death of the man who was intended to be his victim ; that in taking the life of Terry, under the circumstances, he was acting under the authority of the law of the United States, and was justified in doing so ; and that he is not liable to answer in the courts of California on account of his part in that transaction.

“We therefore affirm the judgment of the Circuit Court authorizing his discharge from the custody of the sheriff of San Joaquin county.”

## CHAPTER XXI.

### CONCLUDING OBSERVATIONS.

Thus ends the history of a struggle between brutal violence and the judicial authority of the United States. Commencing in a mercenary raid upon a rich man's estate, relying wholly for success on forgery, perjury, and the personal fear of judges, and progressing through more than six years of litigation in both the Federal and the State courts, it eventuated in a vindication by the Supreme Court of the United States of the constitutional power of the Federal Government, through its Executive Department, to protect the judges of the United States courts from the revengeful and murderous assaults of defeated litigants, without subjecting its appointed agents to malicious prosecutions for their fidelity to duty, by petty State officials, in league with the assailants.

The dignity and the courage of Justice Field, who made the stand against brute force, and who, refusing either to avoid a great personal danger or to carry a weapon for his defense, trusted his life to that great power which the Constitution has placed behind the judicial department for its support, was above all praise.

The admirable conduct of the faithful deputy marshal, Neagle, in whose small frame the power of a nation dwelt at the moment when, like a modern David, he slew a new Goliath, illustrated what one frail mortal can do, who scorns danger when it crosses the path of duty.

The prompt action of the Executive Department, through its Attorney-General, in directing the marshal to afford all necessary protection against threatened danger, undoubtedly saved a justice of the Supreme Court from assassination, and the Government from the disgrace of having pusillanimously looked on while the deed was done.

The skill and learning of the lawyers who presented the case of Neagle in the lower and in the appellate courts reflected honor on the legal profession.

The exhaustive and convincing opinion of Circuit Judge Sawyer, when ordering the release of Neagle, seemed to have made further argument unnecessary.

The grand opinion of Justice Miller, in announcing the decision of the Supreme Court affirming the order of the Circuit Court, was the fitting climax of all. Its statement of the facts is the most graphic and vivid of the many that have been written. Its vindication of the constitutional right of the Federal Government to exist, and to preserve itself alive in all its powers, and on every foot of its territory, without leave of, or hin-

drance by, any other authority, makes it one of the most important of all the utterances of that great tribunal.

Its power is made the more apparent by the dissent, which rests rather upon the assertion that Congress had not legislated in exact terms for the case under consideration, than upon any denial of the power of the Federal Government to protect its courts from violence. The plausibility of this ground is dissipated by the citations in the majority opinion of the California statute concerning sheriffs, and of the federal statute concerning marshals, by which the latter are invested with all the powers of the sheriffs in the States wherein they reside, thus showing clearly that marshals possess the authority to protect officers of the United States which sheriffs possess to protect officers of the State against criminal assaults of every kind and degree.

During the argument in the Neagle case, as well as in the public discussions of the subject, much stress was laid by the friends of Terry upon the power and duty of the State to afford full protection to all persons within its borders, including the judges of the courts of the United States. They could not see why it was necessary for the Attorney-General of the United States to extend the arm of the Federal Government. They held that the police powers of the State were sufficient for all purposes, and that they were the sole

lawful refuge for all whose lives were in danger. But they did not explain why it was that the State never did afford protection to Judges Field and Sawyer, threatened as they notoriously were by two desperate persons.

The laws of the State made it the duty of every sheriff to preserve the peace of the State, but the Terrys were permitted, undisturbed and unchecked, to proclaim their intention to break the peace. If they had announced their intention, for nearly a year, to assassinate the judges of the Supreme Court of the State, would they have been permitted to take their lives, before being made to feel the power of the State? Would an organized banditti be permitted to unseat State judges by violence, and only feel the strong halter of the law after they had accomplished their purpose? Can no preventive measures be taken under the police powers of the State, when ruffians give notice that they are about to obstruct the administration of justice by the murder of high judicial officers? It was not so much to insure the punishment of Terry and his wife if they should murder Justice Field, as to prevent the murder, that the executive branch of the United States Government surrounded him with the necessary safeguards. How can justice be administered under the federal statutes if the federal judges must fight their way, while going from district to district, to



overcome armed and vindictive litigants who differ with them concerning the judgments they have rendered ?

But it was said Judge Terry could have been held to bail to keep the peace. The highest bail that can be required in such cases under the law of the State is five thousand dollars.

What restraint would that have been upon Terry, who was so filled with malice and so reckless of consequences that he finally braved the gallows by attempting the murder of the object of his hate ? But even this weak protection never was afforded. Shall it be said that Justice Field ought to have gone to the nearest justice of the peace and obsequiously begged to have Terry placed under bonds ? But this he could not have done until he reached the State, and he was in peril from the moment that he reached the State line. The dust had not been brushed from his clothing before some of the papers which announced his arrival eagerly inquired what Terry would do and when he would do it. Some of them seemed most anxious for the sensation that a murder would produce.

The State was active enough when Terry had been prevented from doing his bloody work upon Justice Field. The constable who had been telegraphed for before the train reached Lathrop on the fatal day, but who could not be found, and was not at the station to

aid in preserving the peace, was quick enough to *arrest Neagle without a warrant, for an act not committed in his presence*, and therefore known only to him by hearsay. Against the remonstrances of a supreme justice of the United States, who had also been chief justice of California, and who might have been supposed to know the laws as well at least as a constable, the protection placed over him by the Executive branch of the Federal Government was unlawfully taken from him and the protector incarcerated in jail. The constable doubtless did only what he was told and what he believed to be his duty. Neagle declined to make any issue with him of a technical character and went with him uncomplainingly. If Neagle's pistol had missed fire, or his aim had been false, he might have been arrested on the spot for his attempt to protect Justice Field, while Terry would have been left free at the same time to finish his murderous work then, or to have pursued Justice Field into the car and, free from all interference by Neagle, have despatched him there. The State officials were all activity to protect the would-be murderer, but seemed never to have been ruffled in the least degree over the probable assassination of a justice of the Supreme Court of the United States. The Terrys were never thought to be in any danger. The general belief was that Judges Field and Sawyer were in great danger from them.

The death of Terry displeased three classes : first, all who were willing to see Justice Field murdered ; second, all who naturally sympathize with the tiger in his hunt for prey, and who thought it a pity that so good a fighter as Terry should lose his life in seeking that of another ; and, third, all who preferred to see Sarah Althea enjoy the property of the Sharon estate in place of its lawful heirs.

It is plain from the foregoing review that the State authorities of California presented no obstruction to Terry and his wife as they moved towards the accomplishment of their deadly purpose against Justice Field. It was the Executive arm of the nation operating through the deputy United States marshal, under orders from the Department of Justice, that prevented the assassination of Justice Field by David S. Terry.

It only remains to state the result of the second trial of the case between Sarah Althea Hill, now Mrs. Terry, and the executor of William Sharon before the Superior Court of the city of San Francisco. It will be remembered that on the first trial in that court, presided over by Judge Sullivan, a judgment was entered declaring that Miss Hill and William Sharon had intermarried on the 25th of August, 1880, and had at the time executed a written contract of marriage under the

laws of California, and had assumed marital relations and subsequently lived together as husband and wife. From the judgment rendered an appeal was taken to the Supreme Court of the State. A motion was also made for a new trial in that case, and from the order denying the new trial an appeal was also taken to the Supreme Court. The decision on the appeal from the judgment resulted in its affirmance. The result of the appeal from the order denying a new trial was its reversal, with a direction for a new trial. The effect of that reversal was to open the whole case. In the meantime William Sharon had died and Miss Hill had married David S. Terry. The executor of William Sharon, Frederick W. Sharon, appeared as his representative in the suit, and filed a supplemental answer. The case was tried in the Superior Court, before Judge Shafter, in July, 1890, and on the 4th of August following the Judge filed his findings and conclusions of law, which were, briefly, as follows :

That the plaintiff and William Sharon, deceased, did not, on the 25th of August, 1880, or at any other time, consent to intermarry or become, by mutual agreement or otherwise, husband and wife ; nor did they, thereafter, or at any time, live or cohabit together as husband and wife, or mutually or otherwise assume marital duties, rights, or obligations ; that they did not, on that day or at any other time, in the city and county of San

Francisco, or elsewhere, jointly or otherwise, make or sign a declaration of marriage in writing or otherwise ; and that the declaration of marriage mentioned in the complaint was false, counterfeited, fabricated, forged, and fraudulent, and, therefore, null and void. The conclusion of the court was that the plaintiff and William Sharon were not, on August 25, 1880, and never had been husband and wife, and that the plaintiff had no right or claim, legal or equitable, to any property or share in any property, real or personal, of which William Sharon was the owner or in possession, or which was then or might thereafter be held by the executor of his last will and testament the defendant, Frederick W. Sharon. Accordingly, judgment was entered for the defendant. An appeal was taken from that judgment to the Supreme Court of California, and on the 5th of August, 1892, Sarah Althea Terry having become insane pending the appeal, and P. P. Ashe, Esq., having been appointed and qualified as the general guardian of her person and estate, it was ordered that he be substituted in the case, and that she subsequently appear by him as her guardian. In October following, the appeal was dismissed.

Thus ended the legal controversy initiated by this adventuress to obtain a part of the estate of the deceased millionaire.











7# 507791 80J

7# 507791 80J









Some opinions  
and papers.

1850  
v. 5

39493

Field

UNIVERSITY OF CALIFORNIA LIBRARY



